Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),
Petitioner

v.

COLIN PERRY ET AL.,
Respondents

On Petition For Writ Of Certiorari
To The Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

STEPHEN C. BALKENBUSH, ESQ.*
ROBERT F. BALKENBUSH, ESQ
Thorndal, Armstrong,
Delk, Balkenbush & Eisinger
6590 S. McCarran Blvd, Ste. B
Reno, NV 89509
(775) 786-2882

* *Counsel of Record*

May 2, 2006

Attorneys for the Petitioner

QUESTION PRESENTED

Whether the conclusive presumption in NRS 617.457 violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO PROCEEDING

I. Petitioner

Public Agency Compensation Trust (PACT)

II. Respondents

Colin Perry

Employers Insurance Company of Nevada

Nevada Department of Administration Appeals Office

CORPORATE DISCLOSURE STATEMENT

Petitioner PUBLIC AGENCY COMPENSATION TRUST (hereinafter "PACT") is a Self-Insured Association which provides industrial insurance to Elko County, including the Elko County Sheriff's Department.[1]

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[1] In fact, PACT provides industrial insurance to a number of political subdivisions, including, but not limited to: the City of Carlin, the City of Caliente, Carson City, Churchill County, Douglas County, the City of Ely, Esmeralda County, Eureka County, the towns of Fernley, Gardnerville and Genoa, Humboldt County, Lander County, Lincoln County, the City of Lovelock, Lyon County, the City of Mesquite, Mineral County, Nye County, the town of Pahrump, Pershing County, Storey County, the town of Tonopah, the City of Wells, White Pine County, and the cities of Yerington and Winnemucca.

There is no parent or publicly held company owning 10% or more of the corporation's stock. Rule 29.6.

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JURISDICTION

Petitioners seek review on certiorari of an Order Denying En Banc Reconsideration entered by the Nevada Supreme Court on February 1, 2006.

Jurisdiction is based upon S.C.R. 10(c) as the Nevada Supreme Court has decided an important federal question in a way that conflicts with decisions of the United States Supreme Court. The Court also has jurisdiction pursuant to 28 U.S.C. § 1257 as it involves a Nevada state statute that is repugnant to the United States Constitution. Specifically, NRS 617.457 is in violation of the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner PUBLIC AGENCY COMPENSATION TRUST (hereinafter "PACT") is a Self-Insured Association which provides industrial insurance to Elko County, Nevada, including the Elko County Sheriff's Department.[2]

Respondent COLIN PERRY (hereinafter "Perry") is a resident of Elko County and was an employee of the Elko County Sheriff's Department in the capacity of a Deputy

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[2] In fact, PACT provides industrial insurance to a number of political subdivisions, including, but not limited to: the City of Carlin, the City of Caliente, Carson City, Churchill County, Douglas County, the City of Ely, Esmeralda County, Eureka County, the towns of Fernley, Gardnerville and Genoa, Humboldt County, Lander County, Lincoln County, the City of Lovelock, Lyon County, the City of Mesquite, Mineral County, Nye County, the town of Pahrump, Pershing County, Storey County, the town of Tonopah, the City of Wells, White Pine County, and the cities of Yerington and Winnemucca.

Sheriff at all times relevant to the subject matter of the case at bar.

The Employers Insurance Company of Nevada (hereinafter "EICN") is currently a mutual insurance company providing industrial insurance to employers in the State of Nevada. At some time pertinent to the factual aspect of this case, EICN was known as the State Industrial Insurance System (hereinafter "SIIS").

Perry was a Deputy Sheriff for Elko County from 1986 to 2000. App. Vol. X 1852-54; App. Vol. IX 1704. In 1992, Perry filed a claim for coronary artery disease with Elko County. App. Vol. II 198-203. The SIIS, now EICN, was the worker's compensation carrier for the County at that time. EICN accepted his claim.

In 1998, Perry sought to reopen his coronary artery disease claim. App. Vol. II 196-197, 287. The EICN denied his request. Id. Perry appealed EICN's determination to a Hearing Officer. Id. at 189-90. The Hearing Officer affirmed the EICN's determination, concluding that the PACT was now responsible for Perry's coronary artery disease by virtue of the last injurious exposure rule. Id. Perry and the PACT appealed the Hearing Officer's decision to an Appeals Officer. App. Vol. I 181-82, 186; App. Vol. II 288-90. These appeals were assigned official numbers; namely, Appeal No. CAE-1999-C-898-TR and Appeal No. CAE-1999-E-907-TR. Id.

In 1998, Perry also filed a claim for his coronary artery disease with the PACT. App. Vol. VIII 1567 (Deposition of Dr. Owens, at Exhibit 2). The PACT denied his claim on the basis that the factual circumstances supported reopening of his coronary artery disease claim filed with EICN. App. Vol. II 193-94. Perry appealed the PACT's determination to a Hearing Officer. Id. at 191-92. The Hearing Officer reversed the PACT's determination. Id.

The PACT appealed the Hearing Officer's decision to an Appeals Officer, and an official number was assigned to the PACT's appeal; namely, Appeal No. CAE-1999-E-842-TR. App. Vol. I 7-9, 184-85; App. Vol. II 290.

By written decision entered on December 13, 2000, the Appeals Officer held the PACT responsible for Perry's coronary artery disease. App. Vol. XI 2088-2101; App. A. 1a-15a.

On January 9, 2001, the PACT filed a Petition for Judicial Review with the District Court contending, *inter alia*, that the conclusive presumption in NRS 617.457 violated the due process clause of the Fourteenth Amendment. By written decision entered on August 21, 2002, the District Court denied PACT's petition for judicial review. App. Vol. XI 2139-2150; App. B 1b-12b. On August 28, 2002, written notice of entry of the District Court's order was served by mail on PACT. App. Vol XI at 2151-52. On September 18, 2002, PACT filed its notice of appeal with the District Court. Id. at 2153-55.

On October 18, 2005, the Nevada Supreme Court entered an order affirming the District Court's denial of the petition for judicial review. App. C 1c-6c. The Petitioner thereafter filed a request for rehearing, and on December 20, 2005, the Nevada Supreme Court issued an order denying rehearing. App. D 1d-2d.

Petitioner subsequently filed a Petition for En Banc Reconsideration with the Nevada Supreme Court. App. E 1e-2e. On February 1, 2006, the Nevada Supreme Court entered an order denying en banc reconsideration. Id.

INTRODUCTION

This case involves the constitutionality of the conclusive presumption in NRS 617.457, a Nevada statute

within the Nevada Occupational Disease Act. As the Nevada Supreme Court has explained, "[t]he primary purpose of Nevada's workers' compensation laws is to provide economic assistance to persons who suffer disability or death as a result of their employment." Gallagher v. City of Las Vegas, 114 Nev. 595, 600, 959 P.2d 519, 521 (1998), emphasis added.

The conclusive presumption in NRS 617.457 eliminates the requirement of proof of a causal relation between heart disease and the occupations of policemen and firemen. Indeed, the presumption created by NRS 617.457(1) being a conclusive one, and hence not rebuttable by proof of the actual facts, requires an adjudication that a perfectly healthy off-duty policeman (and even a retired policeman), who may bring on a heart attack by overexertion working at home or on the last day of a lengthy out-of-state vacation, suffered the attack in the course of his employment, in the line of duty, and within the scope of his employment, despite the circumstance that the situation is entirely without foundation in fact. See Ducharme v. City of Putnam, 285 A.2d 318 (Conn. 1971); NRS 617.457(1). Tthe PACT respectfully submits that NRS 617.457 creates a conclusive presumption in violation of the Due Process Clause. In addition, this appeal has enormous public policy implications as recent actuarial reports have determined that the conclusive presumption of work related heart disease will create an estimated $2.8 billion dollars in unfunded workers compensation liability over the next three decades.

The conclusive presumption in NRS 617.457 constitutes an attempt, by legislative fiat, to enact into existence a fact which does not, and cannot be made to, exist

in actuality.[3] Ducharme v. City of Putnam, 285 A.2d at 321-22. The power to create presumptions is not a means of escape from constitutional restrictions Id. It is not without significance that although many states have recognized the special situation of firemen and policemen, and the problems of proving a causal relationship between their employment and heart ailments and have provided special treatment for them in the nature of rebuttable presumptions, **as to causation, no other state appears to have successfully attempted by legislative fiat and conclusive presumption to bar the insurer from attempting to prove the negative fact that in a contested worker's compensation case the heart ailment was not causally connected with the employment.** Ducharme v. City of Putnam, 285 A.2d at 322.

The PACT believes this Court is constrained to hold that the conclusive presumption prescribed by NRS 617.457(1) in the adjudication of workmen's compensation cases is in contravention of the due process clause of the United States Constitution.

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[3] There is no consensus in the medical or scientific community that employment as a police officer or fireman causes heart disease. Hence, it is patently irrational to conclusively presume that any heart disease suffered by a policeman or fireman during his lifetime is job-incurred, if the heart disease manifests itself anytime after 5 years of continuous work in that occupation. See, PACT Reply Brief at pp.12-16; Vol IX, Appellant's Appendix at 1160-1703. See App. C at 3c.

LEGAL ARGUMENT

A. The United States Supreme Court Has Found Statutes Creating Conclusive or Irrebuttable Presumptions Invalid and Violative of Due Process.

Several cases heard by the Supreme Court of the United States demonstrate how conclusive presumptions enacted in other states have been found to violate the due process clause of the Fourteenth Amendment.[4] One example is Vlandis v. Kline, which involved a Connecticut statute regarding residency status in determining tuition rates for the state university system. 412 US 441, 93 S. Ct. 2230 (1973). Under the Connecticut statute, for tuition purposes, the status of the student as a nonresident at the time of application for admission was conclusively presumed to continue for the entire period of attendance. Id. This created a due process issue because nonresident students were required to pay higher tuition in order to attend the state university, and they were not afforded the opportunity to present evidence of residency.

The conclusive presumption of the statute was challenged by students who had become a bona fide residents of the state, yet they were still considered nonresidents for tuition purposes because they were not residents at the time they applied to the university system. Id. The state argued

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[4] The right of due process is a federal right. Therefore, whether legislation violates due process must be analyzed under the principles articulated and applied by the Unites States Supreme Court. The Nevada Supreme tacitly acknowledged the foregoing point when it cited in support of its order of affirmance Allen v. State Pub. Emp. Ret. Bd., 100 Nev. 130, 676 P.2d 792 (1984).

that this conclusive or irrebuttable presumption was necessary because they had a valid interest in equalizing costs for bona fide residents who subsidize the state university system, and that the state can reasonably offer lower rates only to its established residents whose past tax contributions to the state have been higher. The other reasoning offered by the State was that it offers administrative certainty and simplifies what would be an expensive administrative burden of evaluating when bona fide residency exists. Id. at 451, 2236.

The Court noted that, "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." Id. At 446, 93 S. Ct. At 2233. The Court went on to hold that "it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." Id at 452, 93 S. Ct. at 2236.

Another case where the Supreme Court found that an irrebuttable presumption violated the Due Process Clause involved a school board policy which required pregnant female teachers to terminate employment at least five months before their due date. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791. (1973). There was no individualized determination by the teacher's doctor, or the school board, as to a particular teacher's ability to continue at her job. The Court found that the policy amounted to a conclusive presumption that every pregnant teacher who reached a certain date of pregnancy is physically incapable of continuing employment, even when the medical evidence as to an individual woman's physical status might be wholly to

the contrary. Id. at 644. It was evident to the Court that the ability of any particular pregnant woman to continue to work past any fixed time is very much an individual matter, thus the conclusive presumption embodied in the policy was neither necessarily nor universally true, and violated the Due Process Clause. Id.

The Court also addressed the school board's argument that the mandatory termination date serves the state's interest of administrative convenience in keeping physically unfit teachers out of the classroom. The Court held that "[w]hile it might be easier for the school board to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." Id.

The Supreme Court has used the same principles and analysis in finding other laws containing irrebuttable presumptions to violate due process rights. An irrebuttable presumption under an Illinois law that unmarried fathers are unsuitable and neglectful parents was found to violate due process because parental unfitness must be established on the basis of individualized proof. Stanley v. Illinois, 405 U.S. 645, 92. S. Ct. 1208 (1972). Despite the state's interest in protecting children from neglectful parents, the means used to achieve this interest must still be constitutionally defensible. Id. at 652, 1213. In another Supreme Court decision, a "tax dependent" provision of the Food Stamp Act that rested on an irrebuttable presumption often contrary to fact was invalid for lacking critical ingredients of due process. United States Dep't of Agric. v. Murry, 413 U.S 508, 93 S. Ct. 2832 (1973). See also, Turner v. Dep't of Employment Sec., 423 U.S. 44, 96 S. Ct. 249 (1975),

(presumption that pregnant women are incapable of working after six months of pregnancy.)

Just like the statutes in the aforementioned Supreme Court cases, NRS 617.457 creates an irrebuttable presumption that all heart disease suffered by police officers is a result of their employment. The effect of that irrebuttable presumption is that it provides no opportunity to Insurers and Employers who are required to provide workers' compensation coverage to demonstrate that the heart disease is not work related.

As the cases illustrate, an irrebuttable or conclusive presumption should be based upon a presumption that is necessarily or universally true in fact. The Nevada Supreme Court has supported this view and described the constitutional burden as to a conclusive presumption as requiring "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Edwards v. Sheriff, Clark County, 93 Nev. 13, 15, 558 P.2d 1144 (1977). Just as it is not necessarily or universally true in fact that all women who are 4 months pregnant are unable to work, that out of state college students never become bona fide residents, or that all unmarried fathers are unfit parents, it is not necessarily or universally true in fact that all heart disease suffered by police officers during their lifetime is the result of their occupation, if the disease manifests itself anytime after 5 years of continuous work in that occupation. Due process requires that each case be considered on an individual basis.

Furthermore, the Supreme Court stresses that administrative ease and legitimate state interests cannot save a conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means to achieve the State's goals. While Nevada may have a legitimate interest in ensuring that police

officers receive workers' compensation benefits, encouraging police officers to remain in public service, and in making the administrative process for such claims more efficient, the means used by the State in furtherance of those interests have subverted the due process rights of the insurers and employers who are required to pay for the workers' compensation claims. By relieving police officers of the burden of proving the causal connection between their heart disease and their employment, the legislature has effectively stripped the insurers and employers of the opportunity to challenge a heart disease claim that is totally unrelated to employment. Just as the United States Supreme Court has expressed, when there are reasonable alternative means to promote the State's interest without violating due process, those means must be employed.

If the State of Nevada has an interest in making an outright gift or special benefit to police officers and firemen, it must do so outside the Nevada Industrial Insurance Act and Nevada Occupational Disease Act. See, Ducharme the City of Putnam 285 A. 2d at 322-23. Such a special benefit or gift type legislation is not present before this Court for consideration. The PACT respectfully submits that regardless of what the Nevada Legislature might have constitutionally done to provide police officers and firemen a heart disease benefit, the legislature did not do so in enacting NRS 617.457(1). A special gift or benefit cannot come under the guise of workers' compensation benefits and at the expense of the insurers and employers who must pay for those benefits. Doing so has violated the due process rights of those insurers and employers.

Finally, as previously expressed by the United States Supreme Court in Tot v. United States, 319 U.S. 463 (1943), a presumption cannot be prescribed solely because it is very difficult for the opposing counsel to prove his case. *Id. at*

467-69. A fortiori, the foregoing is true with respect to statutory conclusive presumptions, Ducharme v. City of Putnam, 285 A.2d 318, 321-22 (Conn. 1971).[5]

B. The Usery Case Demonstrates that the Five Year Rule is Completely Arbitrary

In the Usery case, there was a consensus that pneumoconiosis was causally related to the occupation of coal mining, through inhalation of coal dust. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 26-28 (1976). It was this foundational fact that permitted congress to enact a rebuttable presumption based upon years of employment. Id. In turn, the congressional record contained medical evidence indicating the noticeable incidence of pneumoconiosis in cases of miners with ten (10) years employment in the mines. Id. Therefore, the court could not say it was "purely arbitrary" for congress to select the 10 year figure as a point of reference for the rebuttable presumptions at issue in that case. Id.

In contrast to the Usery case, there is no similar medical consensus on employment as a police officer or fireman and the causation of heart disease. Hence, it was improper for the legislature to even establish a duration of employment rule as a premise for the conclusive presumption at issue in this case.

Furthermore, the specific legislative history upon which the Nevada Legislature premised its determination to

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[5] As a result, the PACT respectfully submits that the hypothesis that the Nevada Legislature may have enacted NRS 617.457 "to eliminate costly battles of the experts used to prove or disprove a causal connection between firefighting and police work and heart disease," cannot survive the due process challenge pressed by PACT in this case. App. C at 4c.

enact the conclusive presumption in NRS 617.457 is part of the record on appeal. See, Vol IX, Appellant's Appendix at 1160-1703. The "stuff of actual experience" amassed in this legislative history was essentially two (2) appeals officer decisions filed respectively on March 21, 1989 and August 12, 1987. Id. In this legislative history, there is no medical evidence indicating that 5 years' employment as a police officer fireman is associated with a notable incidence of heart disease. Id. For this reason, the 5 year employment rule is "purely arbitrary." Moreover, the 1987 Appeals Officers decision is scholarly and clearly proves or shows that it was irrational for the Nevada Legislature in 1989 to have concluded that after 5 years of work as police officer fireman, any heart disease that a policeman or fireman has in his entire life arose out of and in the course of his employment as a policeman or fireman. See, PACT Reply Brief at pp.12-16.

C. The Implications of NRS 617.457 Demonstrate the Lack of Due Process

Following the administrative trial of this matter, new information arose that demonstrated the effect NRS 617.457 will have on the State of Nevada. On July 31, 2005, an article appeared in the Las Vegas Review Journal which discussed NRS 617.457. See, PACT's Petition for En Banc Reconsideration. The subject of the article was the effect that NRS 617.457 and the corresponding lung and hepatitis statutes will have on the local governments who must provide workers' compensation benefits for public safety workers. Until recently, the financial impact of these statutes was unknown.

The article discussed actuarial reports which examined the outstanding benefit costs that would be incurred for public safety worker heart disease, lung disease

and hepatitis claims. Id. The reports were prepared for various Nevada cities and entities that would be effected by such claims. Id. The actuarial reports were completed for the Cities of Las Vegas, North Las Vegas, Henderson, Reno, Sparks, and the Las Vegas Metropolitan Police Department. Of significance, the article pointed out that the actuarial report completed for the City of Las Vegas found that the city faced at least $791 million of claims-related expenses as a result of the conclusive presumption created by the heart, lung, and hepatitis statutes. The combined cost for all of the entities who participated in the study was estimated at $2.8 billion over the next three decades, which the reports identified as a conservative estimate. Id.

The factual information contained within the article and the reports raises significant public policy issues for the State of Nevada. By creating a conclusive presumption that all heart disease suffered by police officers is work related, the Legislature has created an unfunded liability the local governments and their insurers must bear to the tune of hundreds of millions of dollars.

This unfunded mandate is contrary to the public policy of the State of Nevada. A statutory provision added in 1999 specifically requires legislative measures that will cost local governments in excess of $5,000 to indicate that the measure contains an unfunded mandate, and whether the measure was requested by the local governments who will bear the costs. NRS 218.2479. The clear intent of this statute is to avoid sticking local governments with unfunded mandates unless the local governments are the ones requesting the increase in programs or services.

The fiscal impact of NRS 617.457 is only now being revealed to counties, cities, and insurers who will bear the cost. The statute constitutes an unfunded mandate which the local governments of Nevada never requested, and one which

the local governments of Nevada cannot afford. The statute's violation of due process will ultimately have serious public policy implications for the State of Nevada.

CONCLUSION

In accordance with the foregoing, Petitioner respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

STEPHEN C. BALKENBUSH, ESQ.*
ROBERT F. BALKENBUSH, ESQ.
Thorndal, Armstrong,
Delk, Balkenbush & Eisinger
6590 S. McCarran Blvd, Ste. B
Reno, NV 89509
(775) 786-2882

* *Counsel of Record*

May 2, 2006

Attorneys for the Petitioner

APPENDIX A

NEVADA DEPARTMENT OF ADMINISTRATION
BEFORE THE APPEALS OFFICER

FILED
DEC 13 2000
Dept. of Administration
Appeals Officer

In the Matter of the Industrial Insurance Claim	Claim Number: 92-032695.2 7143990211
Of	Hearing Number: CHE1999-C-2468-EC CHS1999-C-2167-EC
COLIN PERRY	Appeal Number: CAE1999-E-907-TR CAE1999-C-898-TR CAE1999-E-842-TR

Appeals by the Claimant, Employer and Employer's self-insured group from the decisions of the Hearing Officer dated March 25 and April 13, 1999.

DECISION OF THE APPEALS OFFICER

The above-entitled matter was heard on September 25, 27 and November 7, 2000. The final transcript was received on November 29, 2000. The Claimant was represented by Barbara Gruenewald, Esq. The Employer Insurance Company of

Nevada, a mutual insurer, was represented by Susan Campbell, Esq. The Employer and the Public Agency Compensation Trust (PACT) were represented by Robert Balkenbush, Esq. The hearing was conducted pursuant to Chapters 233B and 616A to 616D of the Nevada Revised Statutes.

Issues:

1. Must a police officer prove his employment caused his heart disease to receive coverage?

2. Is the conclusive presumption provided by statute for coverage of heart disease for police officers unconstitutional?

3. Should the 1992 claim for heart disease be reopened or a new claim accepted?

4. Since the same employer employed the police officer, but the insurers covering the employer changed, does the last injurious exposure rule apply?

Having heard the testimony and considered the documents, the Appeals Officer finds as follows:

FINDINGS OF FACT

The Proceedings

1. Mr. Perry has been in law enforcement since 1976. He was a deputy sheriff for Elko County from July 1986 to February 2000. In 1992 he suffered an injury to his heart and the Insurer for the County at that time, the State Industrial Insurance System (SIIS), now Employers Insurance Company of Nevada, a mutual insurance company (EICN), accepted his claim. In 1998, he suffered a new injury to his heart and filed a claim with his Employer, Elko County. The Public Agency Compensation Trust (PACT) which is the self-insured group presently insuring the County, denied his claim.

2. In Appeal Number CAE1999-E-842-TR, the Hearing Officer reversed PACT's determination and applied the conclusive presumption regarding heart disease and last injurious exposure rule to require PACT to cover the 1998 injury. The Employer and PACT appealed.

3. In Appeal Number CAE1999-C-989-TR and Appeal Number CAE1999-E-907-TR, the Insurer (EICN), denied the Claimant's request to reopen his 1992 claim. The Hearing Officer affirmed the decision under the last injurious exposure rule. The Claimant, the Employer and PACT appealed that decision.

4. At all times in this case, PACT represented the Employer.

The Claimant's Work History

5. The Claimant began his career as a special deputy for the City of Wells and Elko in 1976. In July 1986, he became a deputy sheriff for Elko County. The Claimant had no break in his employment. Exhibit 28.

6. Since 1986, the Claimant was the deputy assigned to Mountain City, Nevada in northeast Elko County. He was the sole deputy responsible for an area of 8,000 square miles surrounding Mountain City. Exhibit 29. He lived in the police substation and was "on-call" for work 24 hours a day, seven days a week. His "official" shift for duty was weekdays from 2 to 10 P.M. and weekends from 6 P.M. to 2 A.M. This shift allowed him to be on duty when the local bars were busy. His supervisor and relief personnel were in Elko 85 miles away. The Claimant was relieved for vacations or hunting trips by a deputy from Elko. If the Claimant transported prisoners to jail in Elko, it required 6 hours for the round trip.

7. According to the Claimant, his assignment "wasn't a job, it was a life."

8. His duties as sheriff were varied. They included removing abandoned vehicles, monitoring the local bars, making traffic stops and completing reports on vandalism or other activities. Exhibits 18 to 24. In July 1995, he was shot at during a DUI traffic stop and called for back-up help from Elko. The Elko deputies arrived over an hour later while he was still in pursuit and under gunfire. The assaulting driver, known to the Claimant for many years as a local resident, was killed during this shoot-out.

9. Since the "shoot-out" was a significantly stressful event, Dr. Seaich reported it in his notes in October 1995. Exhibit 11, page 46.

10. The Claimant served as the local resident deputy coroner. His duties included attending the death scenes of friends and other residents of the County. He completed the tasks necessary to transport the body and the reports regarding the cause of death, whether from terminal illness or suicide.

11. In poignant testimony, Officer Clair Morris, the Claimant's supervisor, confirmed his duties and shift hours, including the on-call status of the job. Officer Morris is stationed in Elko, 85 miles away. He described the occasions when he would assign other officers to relieve the Claimant for vacations or assist him on special tasks, such as recovering dead bodies. He also described the lonely outpost manned by the Claimant. He replaced the Claimant with two officers who share the duties in Mountain City, since Officer Morris was unable to find one officer with the Claimant's dedication and willingness to work all hours of the day and night. Officer Morris holds the Claimant in high esteem and believes the Claimant served and protected his County well.

12. Counsel for PACT emphasized the variety of tasks performed by the Claimant as a police officer which were not stressful or did not require long hours on the job, such as recovering abandoned vehicles. The summaries of the

Claimant's duties and his "on-call" status contradict Counsel's view of the job actually performed by the Claimant over his many years with the County. I accept the descriptions of the deputy job independently offered by Officer Morris and the Claimant.

13. The Claimant was employed full-time and continuously as a deputy sheriff for more than 5 years in Nevada.

The Medical Evidence

14. The Claimant suffered from unstable angina from an occlusion in his right artery on June 26, 1992. The Insurer for the County at that time was EICN, formerly SIIS. The Insurer accepted his claim for coverage. In July 1993, the Claimant received a 15 percent permanent partial disability (PPD) award. Exhibit 1, page 96 and Exhibit 7, pages 49 to 52. He was released and returned to his full time work as a deputy with no restrictions. His employer, Elko County, knew about his condition and retained him as a deputy.

15. On September 5, 1998, the Claimant suffered chest pains and immediately sought medical treatment. Dr. Owens diagnosed unstable angina and performed an angioplasty on the left artery. Exhibit 8. The Claimant returned to work, but in late September 1998, suffered leg and back injuries from lifting a dead body at the scene of an automobile accident. That claim is not at issue in this case. Exhibits 5 and 6.

16. In 1999, the Claimant underwent another angioplasty. Exhibit 8, pages 22 to 24 and Exhibit 15.

17. Upon receipt of the medical records for the 1998 treatment, the Insurer denied the Claimant's request to reopen the 1992 claim. The Employer, through PACT, denied the claim for the 199[illegible]ent since he had heart disease in 1992.

18. Drs. Owens, Chanderraj and Bryg agree coronary artery disease is heart disease. Exhibits 15 and 26 and Transcript of September 27, 2000. Coronary artery disease causes ruptures and lesions in the arteries. The physicians agree the Claimant has coronary artery disease and suffers from heart disease. They agree he suffered lesions and ruptures requiring angioplasty in 1992, 1998, and 1999. They agree that the event in 1998 is a new rupture but his coronary artery disease progressed since the original 1992 event.

19. While the Claimant's coronary artery disease progressed from 1992 to 1998, the rupture in 1998 was a new event in a different artery requiring treatment at that time. As Dr. Bryg, for PACT, notes "each time he had an episode of acute coronary syndrome, otherwise known as unstable angina." Exhibit 26, page 12 from pages 47 and 48 of his Deposition. He further states: "Mr. Perry has coronary artery disease, and he had underlying coronary disease that continued from 1992 on. What caused the specific incident in 1998 is not what happened in 1992, but he had a separate lesion rupture 1998, but it is from the arteriosclerosis that he has had ongoing all along. If he did not have arteriosclerosis, he would not have had his acute coronary event." Exhibit 26, page 15 from page 58 of his Deposition.

20. The physicians disagree whether stress caused the coronary artery disease or the ruptures in 1992 and 1998. Dr. Chanderraj, for the Claimant, opines that continued stress on the job increases the risk of, and causes heart disease in police officers and firefighters. Dr. Bryg, for PACT, disagrees and believes only stress from specific emotional or physical events causing immediate angina and pain could be job-incurred. The Nevada Legislature accepted Dr. Chanderraj's position and adopted a conclusive presumption regarding heart disease.

21. The Claimant suffers conditions predisposing him to heart disease. These include his age, diabetes,

hyperlipidema, hypercholesterolemia (high cholesterol), high blood pressure and obesity. He's had diabetes since 1988 and controls it with insulin, diet and exercise. His weight has remained stable or been reduced over 6 years. He takes medications for his blood pressure and cholesterol. The Claimant explained his diet, medications and his actions to correct and treat his medical conditions.

22. Neither Drs. Owens nor Seaich, his treating physicians, gave written directions to the Claimant to correct any of his predisposing conditions. He was compliant with the instructions and medications given by his physicians. Drs. Chanderraj and Bryg could not find any record of non-compliance by the Claimant.

23. The Claimant complied with all the requirements for physicals requested by his Employer. Exhibit 11 and Transcript of September 27, 2000.

24. The Claimant must show he met all the requirements for coverage for heart disease. He sustained that burden and was a credible witness. The Claimant protected and served Elko County for 14 years. Now the statute protects him from his heart disease.

25. The Claimant's Employer throughout those 14 years was Elko County. The County retained him as an employee when he was released to work after the 1992 event. During this period, the carrier for workers compensation changed from the state fund, SIIS, and its successor EICN, to the self-insured group, PACT.

26. The Employer argues that even if the conclusive presumption regarding heart disease applies for acceptance of the claim, the presumption does not apply to the application of the last injurious exposure rule.

The Reopening Request

27. The claims adjuster, for the Insurer, Jennifer Pozun, explained her decision to deny the reopening of the 1992 claim after the 1998 rupture. Because the Claimant was released to full duty, received his PPD and the new rupture was in a different area of the heart, she determined the claim could not be reopened. A new occurrence required a new claim. She did note that a new claim allows the payment of greater compensation, such as wages, since a reopened claim is subject to the wages payable at the time of the original claim. NRS 616C.425. No physician certified a change of circumstances from the 1992 rupture.

CONCLUSIONS OF LAW

Based on the previous Findings of Fact, I conclude, as a matter of law, that:

Requirements for Coverage

1. To be covered for heart disease, a police officer must:

(a) Have a "disease of the heart;"

(b) Have been employed in a full-time continuous, uninterrupted and salaried occupation as a police officer;

(c) Have been employed "in this state;"

(d) Be so employed before the date of disablement;

(e) Submit to pre-employment and annual physical examinations; and

(f) Correct any predisposing conditions leading to heart disease "when so ordered in writing by the examining physician subsequent to the annual examination" if the

correction is within the employee's ability. Subsections 1,3,5 and 6 of NRS 617.457.

2. The Claimant was a deputy sheriff for the County from 1986 to February 2000. He was employed full time, and was on-call for 24 hours a day, 7 days a week. He had no interruption in employment in Elko County, Nevada. He suffered from coronary artery disease, which is heart disease. He was still employed when disabled by the disease. He submitted to each physical examination required by the Employer. He observed and complied with all the dietary advice of his physicians and the medications they prescribed, to minimize and correct his predisposing medical conditions to the best of his ability.

3. If the statutory conditions are met, "diseases of the heart...are conclusively presumed to have arisen out of and in the course of employment." Subsection 1 of NRS 617.457. When the conclusive presumption applies the conditions of the job are of no moment. "Conclusive" means "not admitting of explanation or contradiction; put an end to inquiry;...beyond question." "A conclusive presumption, called also an 'absolute' or 'irrebuttable' presumption, is a rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise." Black's Law Dictionary.

4. The Nevada Supreme Court considered the application of the heart statute to retired firefighters. After reviewing the legislative history of the statute, the Court noted the expanded occupational disease coverage for police officers and firefighters. The Legislature relieved "them from the burden of proving a causal connection between their employment and their disease. (T)he legislature has accepted the existence of such a causal connection and has incorporated it in NRS 617.457(1)." Gallagher v. City of Las Vegas, 114 Nev. 595 at pages 600 to 601 (1998). Finding they "were

employed in full-time continuos, uninterrupted and salaried occupations as firefighters in this state for more than five years before they were disabled, their heart diseases are conclusively presumed to have arisen out of and in the course of their employment." Id. at page 601 and 602. The firefighters "are therefore entitled to occupational disease benefits as a matter of law. We need not decide whether substantial evidence supports the appeals officers' determinations that (they proved)...a casual connection between disease and employment." Id. at page 602.

5. The Claimant provided evidence regarding his duties, his hours of work and the stress of his job. The Employer denigrated this evidence, arguing that the removal of abandoned cars and reports regarding unsolved acts of vandalism were not stressful. While this evidence was presented, none of it was necessary. The conclusive presumption that heart disease is occupational applies if all of the other conditions for coverage are not met by the Claimant. Subsection 1 of NRS 617.457.

6. The Claimant systematically proved he met every requirement for coverage in NRS 617.457. He was employed as a police officer for more than 5 years in this state, participated in all the required physicals, cooperated and corrected his predisposing conditions within his ability and he suffers from heart disease. The conclusive presumption that his heart disease is occupational applies and he receives coverage as a matter of law. NRS 617.457 and Gallagher, supra.

Reopening of the 1992 Claim

7. An Insurer may reopen a claim for further examination and treatment if the physician certifies a change of circumstances related to the occupational disease warranting an increase or rearrangement of compensation. Subsection 8 of NRS 617.457. The Claimant suffered a progression of his coronary artery disease from 1992 to 1998. There is no

evidence of a change of circumstance justifying the reopening of the original claim. No doctor certified such a change. In fact, a new claim form was completed for the 1998 injury. The Insurer properly denied the request to reopen his 1992 claim.

8. If the claim has been reopened, the compensation payable would have been based upon the original claim in 1992 which may have been less than the 1998 compensation. NRS 616C.425.

Last Injurious Exposure Rule

9. If an employee suffers from an occupational disease, the courts allow him to receive coverage form the insurer of the last employer who contributes in any manner to his disability. Collett Electric v. Dubovik, 112 Nev. 193 (1996). If both injuries or diseases are occupational, the last injurious exposure rule is used to determine liability. Las Vegas Housing Authority v. Root, 116 Nev. Adv. Opn. No. 92 (August 30, 2000).

10. In the past, coverage for industrial injuries and occupational diseases was provided in Nevada only by the state fund, NIC and then SIIS. In the early 1980's, the Nevada Legislature began to change this monopoly, allowing first self-insured employers, then groups of employers and in 1999, private carriers to provide coverage. As of January 1, 2000, the state fund became a private carrier as a mutual insurer.

11. With the changes in insurers providing coverage, the application of the last injurious exposure rule in Nevada must be explained. The Court has referred in the past to the possibility the rule should be used to require coverage for the last insurer of the employer. "(T)he *employer/insurer* at the time of (a new injury or aggravation of a prior injury) is liable for all the claimant's benefits even if the second injury would have been much less severe in the absence of the prior

condition, and even if the prior injury contributed to the final condition." (Emphasis added) Collett Electric, supra at page 198. Applying the rule to employers *and insurers* is consistent with the last injurious exposure rule used to assign liability. See generally: 9 Larson's Workers' Compensation Law, Chapter 153 (2000).

12. In this case, it is the insurer that changed not the employer. The Employer, Elko County, has been the Claimant's Employer since 1986. The Claimant's Employer continued to employ him after his 1992 rupture until his 1998 rupture. He had the same duties and working environment continuously from 1992 through 1998. The Employer subjected him to the same employment risks contributing to the progression of his coronary artery disease and the rupture in 1998. The conclusive presumption for heart disease applies continuously to the Employer. Over the years, the only change was the Employer's insurer, from SIIS, now EICN, to the Self-Insured group, PACT. Nevertheless, the last injurious exposure rule applies to the change of *insurer*.

13. The rupture in the heart creating the 1998 claim occurred during the period that PACT insured the Employer. The claim was made during that same period. PACT is liable for the payment of the claim.

14. The conclusive presumption for coverage applies when the claim is submitted and accepted. The last injurious exposure rule is applied after the presumption is applied. The Employer argues the cause of the heart disease must be proven to apply the last injurious exposure rule. To return to a requirement that causation be shown for heart disease after applying the statutory presumption is illogical. The insurer covering the Employer during the 1998 rupture is liable for the claim.

15. Elko County and its Self-Insured Group, PACT must pay the compensation owed for the 1998 claim.

Constitutionality

16. The Employer challenged the constitutionality of the conclusive presumption for coverage of heart disease of police officers and firefighters provided in NRS 617.457. The challenges were made on the record to preserve its arguments.

17. The Appeals Officer is not a court for review of constitutional challenges. As the Supreme Court notes, "...an administrative officer such as the NIC Appeals Officer cannot validly exercise purely judicial functions under article 6, section 1, or article 3, section 1, of the Nevada Constitution,..." Nevada Industrial Commission v. Reese, 93 Nev. 115 at page 120 (1977). Recently, the Court found the Nevada statutes defining the courts of this state do not "define...any other administrative agency as a lower court." State Engineer v. Truckee-Carson Irrigation, 116 Nev. Adv. Op. No. 109 at page 5 (November 30, 2000). "(W)e conclude that administrative agencies,...are not 'lower courts' for the purposes" of the Court's own rules, even if they are acting as the exclusive trier of fact. Id.

18. The Appeals Officer cannot consider the constitutionality of a statute. Such a request must be addressed to the District Court. The courts are the arbitrators of the constitutionality of statutes. See also: Marbury v. Madison, 5 U.S. 137 (1803), analyzing the role of the federal, Article III courts.[6]

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[6] The Employer argued the coverage provided for heart disease is "special" legislation for one class of state employees, police officers, favoring them over all others. Such "special" legislation is prohibited by the Nevada Constitution. Article 4, Sections 20 and 21 of the Nevada Constitution. The Nevada Legislature considered the special nature of the duties of police and firefighters and extended coverage to them for specific diseases and illnesses, such as cancer, lung, heart and some infectious diseases. See: NRS 617.455, 617.457, 616A.035 and

DECISION

1. The Hearing Officer decision in Appeal Number CAE1999-E-842-TR reversing the denial of the claim by PACT for the 1998 rupture is reversed. The Employer and Self-Insured Group, PACT, are responsible for compensation.

2. The Hearing Officer decision in Appeal Number CAE1999-C-898-TR and CAE1999-E-907-TR affirming the denial of the request to reopen the 1992 case and applying the last injurious exposure rule for the 1998 claim is affirmed.

APPEALS OFFICER

s/ Teresa P. Froncek Rankin
TERESA P. FRONCEK RANKIN

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final decision of the Appeals Officer, a Petition for Judicial Review must be filed with the district court within thirty (30) days after service by mail of this decision.

616A.265. Those protections were granted because of special nature of their jobs and the exposure they have to such diseases, particularly during rescue or emergency situations. If the Legislature has a rational basis for the special coverage for those employees, the statutes are not special legislation. The Nevada Supreme Court discussed those choices when considering the coverage for retired officers in Gallagher, supra.

Nevada's attorney general must be notified of challenges to the constitutionality of any statute and may be heard in such an action. NRS 30.130.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) I certify that I am an employee of the State of Nevada, Department of Administration, Appeals Officer, and that on this date I deposited for mailing at Carson City, Nevada a true copy of the attached document addressed to:

COLIN PERRY
PO BOX 206
MOUNTAIN CITY, NV 89831

BARBARA GRUENEWALD, ESQ.
121 CALIFORNIA AVE.
RENO, NV 89509

ELKO COUNTY
ATTN: JERI UNDERWOOD
571 IDAHO STREET
ELKO, NV 89801

ROBERT F. BALKENBUSH, ESQ.
THORNDAL, BACHUS, ARMSTRONG &
BALKENBUSH
6590 S. MCCARRAN BLVD., STE. B
RENO, NV 89509

And further provided a copy of the attached document by way of personal messenger from the agencies of:

EMPLOYERS INSURANCE COMPANY
OF NEVADA
LEGAL SERVICES
515 MUSSER ST.
CARSON CITY, NV 89714

December 13, 2000

s/ Kristi Fraser
Kristi Fraser

APPENDIX B

Code 2840

FILED
August 21 2002
Ronald A. Longtin, Jr., Clerk
By: s/ J. Ulleseit
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT FOR
THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

PUBLIC AGENCY COMPENSATION TRUST, a Self-Insured Association, Petitioner, vs. COLIN PERRY, and DOES I Through X, inclusive, Respondent.	Case No.	CV01-00160
	Dept. No.	3

/

ORDER DENYING
PETITION FOR JUDICIAL REVIEW

On January 9, 2001, Petitioner Public Agency Compensation Trust (hereafter "PACT") filed a Petition for Judicial Review from the decision of the Appeals Officer of the Department of Administration Hearings Division regarding a worker's compensation claim. Respondents Colin Perry and

Employers Insurance Company of Nevada (hereinafter "EICN") each filed a Notice of Intent to Participate on January 25, 2001. The Record on Appeal was transmitted on February 13, 2001.

PACT filed its Opening Brief on May 29, 2001. EICN filed its Answering Brief on August 2, 2001. Perry filed his Answering Brief on August 2, 2001. PACT filed its Reply Briefs to EICN and Perry's answering briefs on October 4, 2001.

The Court heard oral arguments in this matter on January 23, 2002.

This Court, having read the above-referenced pleadings, reviewed the file and listened to oral arguments, now finds and concludes as follows:

The Appeals Officer has done an excellent job setting out the facts in this case, so the Court will summarize the main points. Perry has been in law enforcement since 1976. He was a deputy sheriff for Elko County from July 1986 to February 2000. Thus, Perry was employed full-time and continuously as a deputy sheriff for more than five years in Nevada. The Appeals Officer heard extensive testimony regarding his duties, responsibilities and working conditions as a deputy sheriff, as well as expert medical evidence concerning his coronary artery disease and his medical problems in 1992 and 1998.

In 1992, Perry suffered an injury involving an occlusion in the right artery of his heart, and the insurer for the County at that time, the State Insurance System (SIIS), now EICN, accepted his claim. In July 1993, Perry received a 15 percent permanent partial disability award. He returned to his full-time work as a deputy with no restrictions. Elko County knew about his condition and retained him as a deputy. In 1998, Perry suffered another injury involving the left artery of his heart. He filed a claim with his employer, Elko County, but PACT, the self-insured group presently insuring Elko County, denied his claim based on the fact that he had heart disease in 1992.

In Appeal Number CAE1999-E-842-TR, the Hearing Officer reversed PACT's determination and applied the conclusive presumption regarding heart disease and the last injurious exposure rule to require PACT to cover the 1998 injury. The Employer and PACT appealed. The Appeals Officer reversed this decision.

In Appeal Number CAE1999-D-989-TR and Appeal Number CAE1999-E-907-TR, EICN denied the Claimant's request to reopen his 1992 claim. The Hearing Officer affirmed the determination under the last injurious exposure rule. The Claimant, the Employer, and PACT appealed that decision. The Appeals Officer affirmed both of these decisions.

Based on the medical evidence before her, the Appeals Officer found that the 1998 injury was a new event in a different artery, although Perry had underlying coronary disease that continued from 1992 on. In considering the last injurious exposure rule, she determined that PACT was liable for covering the 1998 claim because it occurred during the period that PACT insured Elko County. The Appeals Officer also determined that EICN had properly denied Perry's request to reopen his 1992 claim because there was not evidence of a change of circumstance to justify reopening his claim.

The Appeals Officer found that the Nevada Legislature had adopted a conclusive presumption regarding heart disease in police officers and firefighters. She then found that Perry had complied with all his physicians' instructions and that he had complied with all the requirements for physicals requested by his employer. Thus, the Appeals Officer determined that Perry met all the requirements for coverage for heart disease and he was entitled to the conclusive presumption found in NRS 617.457.

In reviewing an administrative decision, the district court is limited to the record below and to the determination of whether the agency acted arbitrarily or capriciously. *McCracken*

v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). The district court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact. NRS 233B.140(3). The district court should not pass on the credibility of the witnesses or the weight of the evidence, but limit review to a determination that the board's decision is based on substantial evidence. *Nevada Indus. Comm'n v. Hildebrand*, 100 Nev. 121, 124, 676 P.2d 1318 (1984).

I. The conclusive presumption in NRS 617.457.

NRS 617.457 provides for a conclusive presumption that heart diseases have arisen out of and in the course of employment of any police officer or firefighter with five years or more of continuous, uninterrupted employment. PACT contends that since this conclusive presumption applies only to a select number of individuals out of the entire class of Nevada workers, it constitutes "special legislation" and violates the U.S. Constitution and Article 4, § 20 of the Nevada Constitution. PACT argues that this conclusive presumption also violates the Nevada Constitution because it operates to regulate county business since counties and other political subdivisions are generally the exclusive employers of the firefighters and police officers. Under this conclusive presumption, argues PACT, employers of police officers and firefighters with five years continuous employment must pay worker's compensation if the individual develops a heart condition, regardless of the actual cause of the condition.

Perry contends that NRS 617.457 is constitutional because it has a rational relationship to a legitimate government purpose. He argues that the legislative purpose behind the conclusive presumption was to resolve disputes among the medical community and avoid battles of experts regarding whether emotional stress and physical exertion contributed to

heart disease, so police officers and firefighters were relieved from proving a causal connection between heart disease and their employment. Perry also argues that other states have held such special "police-firefighter" type of statutes to be constitutional. Furthermore, Perry argues that he produced sufficient medical evidence at the hearing to establish the causal connection between heart disease and the stress associated with his job. Next, Perry argues that NRS 617.457 is not special legislation and it does not operate to regulate county business in a prohibited manner because it applies uniformly to all police officers and firefighters throughout the State of Nevada.

EICN argues that worker's compensation benefits are not listed as a prohibited item of special legislation in Article 4, § 20 of the Nevada Constitution. Further, EICN contends that the Nevada Industrial Insurance Act does not regulate county and township business; it merely defines the benefits that Nevada employees are entitled to when they are injured within the course and scope of their employment. EICN points out that NRS Chapter 617 also contains other special categories with specific occupational diseases. EICN then argues that even without the legislative presumption, police officers and firefighters are entitled to compensation for heart and lung disease if they meet the requirements of NRS 617.440 for occupational diseases. EICN contends that NRS 617.455 and NRS 617.457 relieve police officers and firefighters from the burden of proving a causal connection between their employment and heart disease. Finally, EICN argues that police officers and firefighters are not always entitled to receive benefits because they must submit to physical examinations and correct predisposing conditions which lead to heart disease when so ordered in writing to be eligible for benefits.

This Court finds that NRS 671.457 is not special legislation that violates Article 4, § 20 of the Nevada Constitution. As EICN noted, worker's compensation benefits

are not on the list of prohibited items of special legislation in Article 4, § 20, and other sections of NRS Chapter 617 permit the designation of categories for specific occupational diseases. The Court also finds that NRS 617.457 does not regulate county business in a prohibited manner because worker's compensation benefits are available to Nevada employees who are injured within the scope and course of their employment, and this statute applies to all police officers who are employed within Nevada for at least five years, regardless of which county they are employed with. Article 4, § 20 does not prohibit laws "relating to," "pertaining to," or "concerning" county business, and the Court finds PACT's argument that the statute regulates county business because counties employ police officers and firefighters to be without merit. *City of Reno v. County of Washoe*, 94 Nev. 327, 580 P.2d 460 (1978).

The Court is not persuaded by PACT's argument that all other jurisdictions with similar statutes have adopted rebuttable presumptions in favor of police officers and firefighters, not conclusive presumptions. The Court agrees with the Respondents that the Nevada Legislature specifically included the conclusive presumption in NRS 617.457 to limit litigation over whether heart disease among police officers and firefighters was work related because of the difficulty of resolving these cases due to the conflicting medical opinions on the subject. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 959 P.2d 519 (1998).

B. NRS 617.457 does not violate the Equal Protection Clause or the Due Process Clause of the 14th Amendment to the U.S. Constitution.

PACT argues that NRS 617.457 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because the classification for firefighters and

police officers bears no rational relationship to the legislative purpose behind it. PACT argues that the legislative purpose was to compensate employees for injuries or diseases which arise out and in the course of employment. Thus, PACT argues, a claimant must establish more than merely being at work and suffering an injury in order to recover. PACT contends that NRS 617.457 guarantees that Nevada firefighters and police officers will also be compensated for heart diseases which are not caused by employment because all they need to prove is that they were employed for five years or more as a firefighter or police officer before the date of disablement in order for heart disease to be conclusively presumed to have arisen out of and in the course of employment. As a result, PACT argues that it is being forced to hear the burden of funding heart conditions that were not caused by employment. Therefore, NRS 617.457 is not rationally related to the purpose behind the Nevada Industrial Insurance Act.

Perry contends that NRS 617.45 does not violate equal protection because the Nevada Legislature had a reasonable basis for the classification of police officers and firefighters under the statute and it is not arbitrary. Perry argues that PACT has failed to show that the classification does not rest on any reasonable basis. Further, Perry contends that all acts of the Nevada Legislature are presumed to be constitutional.

EICN argues that NRS 617.457 does not create a special class of individuals. Instead, it relieves police officers and firefighters from the burden of proving the causal connection between their heart disease and their employment, so long as they meet the requirements imposed by the statute. Next, EICN contends that there is a rational relationship to the legislative purpose because the Nevada Legislature determined that police officers and firefighters would receive protection under NRS 617.457 based on the nature of their jobs.

Next, PACT argues that NRS 617.457 violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution because there is not a rational relationship between the fact proved (5 years continuous employment as a police officer) and the fact presumed (any heart disease contracted by such an officer is causally related to his employment), so this determination is arbitrary and unreasonable and denies PACT the opportunity to rebut the presumption. PACT also contends that there is no substantial indication that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Perry argues that the fact that the Nevada Legislature decided to resolve doubts regarding the causal connection between heart disease and employment in favor of police officers and firefighters does not render the statute arbitrary or irrational. Perry contends that such statutes are presumed to be valid and it is PACT's burden to prove that the statute is unconstitutional.

EICN argues that there is rational relationship to the legislative purpose of NRS 617.457, and PACT has failed to show that it has been deprived of any property or liberty interest by acceptance of a worker's compensation claim pursuant to the requirements of NRS 617.457.

Under NRS 617.358, workers seeking compensation for an occupational disease must establish by a preponderance of the evidence that the disease arose out of and in the course of employment. NRS 617.457(1) removes this burden for police officers and firefighters meeting certain criteria. *See Gallagher, supra.* This statute was enacted in 1969, and each amendment of the statute following its adoption thirty years ago has expanded, rather than limited, coverage. *See Gallagher.* Finally, acts of the Nevada Legislature are also presumed to be constitutional. *Sheriff v. Martin*, 99 Nev. 335, 662 P.2d 634 (1983).

Contrary to PACT's argument, police officers and firefighters are not always entitled to receive benefits. They must still submit to physical examinations and correct predisposing conditions which lead to heart disease to be eligible for benefits. Because of the highly stressful nature of the jobs that police officers and firefighters perform in protecting the public and the fact that these individuals often put their lives in jeopardy on a daily basis, along with the physical exertion required by these jobs, the Court finds there is a rational basis for establishng the conclusive presumption in their favor, and there is a rational relationship between the statute and the legislative purpose.

C. The Appeals Officer did not err in not determining whether Respondent's 1998 acute coronary syndrome was a recurrence of his coronary heart disease.

The Court concludes that the Appeals Officer did not err in finding that Perry's 1998 heart condition was a new and separate incident from the 1992 injury. Under *SIIS v. Swinney*, 103 Nev. 17, 731 P.2d 359 (1987), liability is placed on the insurance carrier who is covering the risk at the time of the most recent injury that bears a causal relationship to the disability because of the last injurious exposure rule. *Id.; see also SIIS v. Jesch*, 101 Nev. 690, 709 P.2d 172 (1985).

In the instance case, the Appeals Officer found that the Nevada Legislature had adopted a conclusive presumption regarding heart disease. The Appeals Officer heard testimony from Perry, his supervisor and Dr. Chanderraj. Perry and his supervisor testified that claimant was on call 24 hours a day, seven days a week and that he was responsible for an area of 8,000 square miles in Northeast Elko County, and had been involved in a shoot out. Dr. Chanderraj testified that the continued stress of police work leads to increased risk of heart

disease in police officers, and Perry produced medical literature to substantiate his claims. Based on the substantial evidence on the record, the Appeals Officer's applied the conclusive presumption in NRS 617.457(1) and found that Perry had met the requirements for coverage for heart disease.

The Appeals Officer then determined that although Perry had underlying heart disease, the 1992 and 1998 injuries were separate events because the blockage of Perry's right artery in 1992 was repaired and he returned to work for six years without any further symptoms before the injury in 1998, which involved a left artery. The Court finds that there was substantial medical evidence available to the Appeals Officer indicating that the stress from Perry's job as a police officer contributed in aggravating or exacerbating his existing heart condition and resulted in the heart problems that he had in 1998. The court concludes that the Appeals Officer was in the best position to weigh the evidence and observe the witnesses and determine their credibility.

D. The Appeals Officer did not exceed her jurisdiction in assessing expert witness fees against Appellant.

With regard to witness fees, NRS 616C.360(1) provides that:

> 1. Any physician or chiropractor who attends an employee within the provisions of chapters 161A to 616D, inclusive, or chapter 617 of NRS in a professional capacity, may be required to testify before an appeals officer. A physician or chiropractor who testifies is entitled to receive the same fees as witnesses in civil cases and, if the appeals officer so orders at his own discretion, a fee equal to that authorized for a consultation by the appropriate schedule of fees for

physicians or chiropractors. These fees must be paid by the insurer.

Under this provision, the Appeals Officer exercised her discretion in determining that the Relative Values for Physicians did not address fees to be paid to a testifying witness. The Appeals Officer determined that Plaintiff's expert was entitled to a fee comparative to what other physicians would charge for testifying as expert witnesses at trial, and she ordered PACT to pay $600.00 in witness fees. Based upon the language of NRS 616C.360(1), the Appeals Officer does not appear to be arbitrary or a clear abuse of discretion.

The Court does not consider PACT's appeal to have been frivolous, and therefore, denies Perry's request for attorney's fees on that basis.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

(1) Petitioner's Petition for Judicial Review is DENIED.

Dated this 20th day of August, 2002.

s/ Jerome Polaha
JEROME M. POLAHA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 21st day of August, 2002, I deposited for mailing a copy of the foregoing to:

Robert F. Balkenbush, Esq.
Katherine F. Bobier, Esq.
THORNDAL, ARMSTRONG, et al.
6590 S. McCarran Blvd., Suite B
Reno, NV 89509

Barbara Gruenewald
121 California Avenue
Reno, NV 89509

Susan M. Campbell, Esq.
Beckett & Yott
307 West Winnie Lane
Suite 1
Carson City, NV 89703

s/Jerrine Ulleseit
JERRINE ULLESEIT
Administrative Assistant

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST (PACT), Appellant, vs. COLIN PERRY AND EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondents.	No. 40241 **FILED** **OCT 18 2005** **JANETTE M. BLOOM** **CLERK OF THE SUPREME COURT** **BY S/ J. Richards** **CHIEF DEPUTY CLERK**

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation case. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. Respondent Colin Perry was an Elko County deputy sheriff, who experienced chest pain in 1992 and 1998 and underwent at least one angioplasty after each episode. Respondent Employers Insurance Company of Nevada (EICON) accepted Perry's claim for coronary artery disease in 1992, but declined to reopen the 1992 claim in 1998. EICON asserted that this was a new injury or aggravation of the 1992 condition. Appellant Public Agency Compensation Trust (PACT), Elko County's workers' compensation provider in 1998, declined Perry's 1998 claim, determining that EICON should be responsible because the 1998 incident was merely a recurrence of his 1992 condition.

An appeals officer held PACT responsible for the 1998 injury, determining that it was a new event involving a different artery than in 1992. PACT now appeals from a district court denying its petition for judicial review.

Under the last injurious exposure rule, the insurer at the time of a new injury or an aggravation of a prior injury is liable for all the claimant's benefits;[1] for recurrences, however, the insurer at the time of the prior injury remains liable.[2]

An appeals officer's characterization of an injury is a fact-based conclusion of law entitled to deference[3] and will not be overturned if supported by substantial evidence.[4] Here, the appeals officer determined that the 1998 episode constituted a new event and, despite the conflicting evidence presented, substantial evidence supports such a determination. The 1998 injury occurred in the left anterior descending coronary artery as opposed to the right coronary artery, the site of Perry's 1992 stenosis. 1992 medical exams revealed that the left side of Perry's heart was operating normally at the time. Accordingly, we conclude that, under the last injurious exposure rule, the appeals officer did not err in determining that PACT was liable as the insurer at the time of the new injury. [5]

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[1] SIIS v. Swinney, 103 Nev. 17, 19-20, 731 P.2d 359, 361 (1987).

[2] Id. at 20, 731 P.2d at 361.

[3] Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. ___, ___, 112 P.3d 1093, 1098 (2005) (citing Swinney, 103 Nev. at 20, 731 P.2d at 361).

[4] Id. at _____, 112 P.3d at 1097.

[5] We have considered PACT's arguments that the appeals officer erred in rejecting its offer of proof that the 1998 injury was a

PACT also argues that NRS 617.457 violates the due process clause. Every legislative enactment enjoys the presumption of constitutional validity, and appellants bear a heavy burden in overcoming it.[6] When considering the validity of legislation under due process attack, "the state enjoys a wide range of discretion to make reasonable classifications for enacting laws over matters within its jurisdiction."[7] "A statutory discrimination will not be set aside if any state of facts may be conceived to justify it."[8] The legislation could rationally conclude that firefighters and police officers run a higher risk of heart disease, thus serving as a reasonable basis for the legislation. We therefore conclude that NRS 617.457 does not violate the due process clause.

PACT also contends that NRS 617.457 violates the equal protection clause. When a classification does not involve a suspect class or fundamental right, or a quasi-suspect class such as gender, the rational basis test applies,[9] as it does here. Under the rational basis test, legislation meets the burden of

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recurrence, and improperly applied NRS 617.457, and conclude that they lack merit.

[6] Allen v. State, Pub. Emp. Ret. Bd., 100 Nev. 130, 133, 676 P.2d 792, 794 (1984).

[7] Id. at 134, 676 P.2d at 794.

[8] Id. at 135, 676 P.2d at 795 (quoting Koontz v. State, 90 Nev. 419, 421, 529 P.2d 211, 212 (1974)) (emphasis added in Allen); see also Boylan v. United States, 310 F.2d 493, 500 (1962) ("Where the legislative judgment as to reasonableness is drawn into question, the judicial inquiry is restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.").

[9] Allen, 100 Nev. at 135-36, 676 P.2d at 795-96.

review when it is rationally related to a legitimate government purpose.[10] "If any state of facts may reasonably be conceived to justify it, a statutory discrimination will not be set aside."[11]

Here, legislative history suggests that police officers and firefighters are at an increased risk of developing heart disease because of chronic stress on the job. As a result, the Legislature could have enacted NRS 617.457 for the purpose of encouraging firefighters and police officers to remain in public service or to eliminate costly "battles-of-the-experts" used to prove or disprove a causal connection between firefighting and police work and heart disease. Thus, we conclude that NRS 617.457 is reasonably related to achieving a legitimate government purpose, and that PACT has failed to overcome the statute's presumption of constitutional validity.

Finally, PACT argues that NRS 617.457 is special legislation regulating county business, which violates Article 4, Section 20, of the Nevada Constitution.[12] "[A] special law...is one which affects only individuals and not a class-one which imposes special burdens, or confers peculiar privileges upon one or more persons in no wise distinguished from others of the

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[10] Id. at 136, 676 P.2d at 795-96; Tarango v. SIIS, 117 Nev. 444, 454-55, 25 P.3d 175, 182 (2001).

[11] State v. District Court, 101 Nev. 658, 662, 708 P.2d 1022, 1025 (1985); see also, Boulder City v. Cinnamon Hills Assocs., 110 Nev. 238, 249, 871 P.2d 320, 327 (1994) ("It is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action.").

[12] Article 4, Section 20 of the Nevada Constitution states: "The legislature shall not pass local or special laws...[r]egulating county and township business..."

same category."[13] Laws regulating county business must be general and operate uniformly throughout the state.[14] NRS 617.457 is not a special law because it affects fulltime firefighters and police officers with at least five years of experience as a class, not individually, and it is a law of general application because it applies to such firefighters and police officers throughout the state. It does not limit its application to any one particular locality. Thus, we conclude that PACT's final argument lacks merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

s/ Becker, C.J.
Becker

s/ Douglas, J.
Douglas

s/ Parraguierre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Thorndal, Armstrong, Delk, Balkenbush & Eisinger / Reno
Anderson & Gruenewald
Beckett & Yott, Ltd./Carson City
Badger & Baker
David R. Ford
William L. Keane

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[13] State of Nevada v. Cal. M. Co., 15 Nev. 234, 249 (1880) (finding that a law which categorizes delinquent taxpayers whose delinquency exceeds $300.00 is general and not constitutional).

[14] Nev. Const. art. 4.§ 21.

Michael E. Langton
John Oceguera, Assemblyman
Woodley & McGillivary
Washoe District Court Clerk

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST (PACT) Appellant, vs. COLIN PERRY AND EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondents.	No. 40241 **FILED** **DEC 20 2005** **JANETTE M. BLOOM** **CLERK OF THE SUPREME COURT** **BY S/ J. Richards** **CHIEF DEPUTY CLERK**

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.

s/ Becker, C.J.
Becker

s/ Douglas, J.
Douglas

s/ Parraguierre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Thorndal, Armstrong, Delk, Balkenbush & Eisinger/ Reno
Anderson & Gruenewald

Beckett & Yott, Ltd./Carson City
Badger & Baker
David R. Ford
William L. Keane
Michael E. Langton
John Oceguera, Assemblyman
Woodley & McGillivary
Washoe District Court Clerk

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST (PACT) Appellant, vs. COLIN PERRY AND EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondents.	No. 40241 **FILED** **FEB 01 2006** **JANETTE M. BLOOM** **CLERK OF THE SUPREME COURT** **BY S/ J. Richards** **CHIEF DEPUTY CLERK**

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.[1]

s/ Rose, J.
Rose

s/ Becker, C.J.
Becker

s/ Gibbons, J.
Gibbons

s/ Douglas, J.
Douglas

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[1] The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in the decision of this matter.

s/ Hardesty, J.
Hardesty

s/ Parraguierre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Thorndal, Armstrong, Delk, Balkenbush & Eisinger/ Reno
Anderson & Gruenewald
Beckett & Yott, Ltd./Carson City
Badger & Baker
David R. Ford
William L. Keane
Michael E. Langton
John Oceguera, Assemblyman
Woodley & McGillivary
Washoe District Court Clerk

FILED
AUG 2 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-36

IN THE

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),

Petitioner,

v.

COLIN PERRY ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

BARBARA GRUENEWALD
ANDERSON & GRUENEWALD
439 MARSH AVENUE
Reno, NV 89509
(775) 322-3366

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2874

*Counsel of Record

QUESTION PRESENTED

Whether the conclusive presumption in NRS 617.457, applicable only to state agencies and political subdivisions employing police or firefighters, violates the Due Process Clause of the Fourteenth Amendment.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Colin Perry respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the Nevada Supreme Court's decision in this case.

STATEMENT OF THE CASE

Petitioner Public Agency Compensation Trust (PACT) has provided workers compensation insurance to the Elko County Sheriff's Department since the mid-1990s. Respondent Perry served as a Deputy Sheriff for Elko County from 1986 to 2000. In 1992, he suffered an injury to his heart and the workers compensation insurer for the Elko County Sheriff's Department at that time accepted his claim. In 1998, as a result of a new heart injury, Perry unsuccessfully attempted to reopen his prior claim. He then made a new claim with the department's new insurer, PACT, which PACT rejected.

Under the pertinent Nevada statute, NRS 617.457, on the books since 1989, Perry's coronary artery disease is conclusively deemed to be occupationally related as a result of his continuous service as a police officer over a period of more than five years. Even so, Nevada law permits an employer to challenge eligibility by showing that the employee failed "to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to the annual examination." NRS 617.457(6). Such predisposing conditions can include diabetes, overweight, smoking, high blood pressure, and high cholesterol.

After receiving extensive evidence on the medical issues from both parties, *see* Pet. at 5a-7a, a hearing officer of the Nevada Department of Administration found that PACT's denial of Perry's claim to be erroneous

and held that Perry's claim was valid. PACT unsuccessfully appealed that decision administratively and then to a state district court, challenging the conclusive presumption's constitutionality at the same time. The district court's decision was affirmed by the Nevada Supreme Court.

In its Petition for Certiorari, PACT provides no basis for further review by this Court. It asserts a single conflict between the Nevada decision this year and a 1971 Connecticut Supreme Court decision that has been superceded by statute, while failing to disclose a California Supreme Court decision that reached the same conclusion as the court below. Respondent respectfully submits that the Connecticut court's decision is doubly flawed in a manner that cancels out any conflict. First, the decision erred in predicting that this Court would liberalize its standing jurisprudence and allow a political subdivision to make a due-process claim against the State that created it, thereby reaching a question no other court has entertained. In fact, in the 35 years since the Connecticut court's prediction, this Court has neither relaxed its standing requirements nor accorded political subdivisions due-process rights against its sovereign. Second, the Connecticut court permitted the legislature to create special compensation requirements as a substitute for the conclusive presumption it found unconstitutional, creating a distinction without a difference. If the decisions in Nevada and Connecticut, 35 years apart, are in actual conflict, a dubious claim at best, it hardly cries out for this Court's attention.

Alternatively, PACT erroneously asserts that the Nevada Supreme Court has failed to apply the correct applicable law of this Court. Even if correct, which Respondent disputes, Rule 10 of this Court's rules makes plain that petitions based on claims of misapplication of the law are "rarely granted." Sup. Ct. R. 10. This petition should be denied.

PACT further asserts that the question presented will have considerable public policy impact *in Nevada,* Pet. at 13-14, but such an assertion provides no basis upon which to invoke this Court's jurisdiction. Its public policy claim is entirely premised on a newspaper article and actuarial studies making representations about expenses associated with this statute that were not part of the record at the factfinding stage of this case and only submitted, improperly, to the Nevada Supreme Court with Petitioner's unsuccessful motion for reconsideration en banc. It was not considered by the court below. It should not be first reviewed by this Court – or by any court, for that matter, because whatever expense this program entails is a matter of Nevada legislative cognizance and not Federal constitutional dispute.

Finally, it should be noted that PACT asserts a due-process right that cannot be accorded to its insured. As a political subdivision of the State, neither Elko County nor its Sheriff's Office may assert a due-process claim against the sovereign that created it. Moreover, PACT was fully aware of the challenged statute when it wrote its insured's policy and cannot claim a lack of notice for the liabilities it was insuring against.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT ASSERTED A CONFLICT THAT REQUIRES THIS COURT'S ATTENTION

PACT focuses its Petition primarily on an assertion that the Nevada Supreme Court's decision conflicts with this Court's precedents that have invalidated other conclusive presumptions on due-process grounds. Pet. at 6-9. The cases cited, however, are inapplicable to this matter and provide no basis for this Court's review.

At bottom, the Nevada Supreme Court's constitutional analysis was appropriate. The Court found that Petitioner did not carry its burden to demonstrate that this 37-year-old law denies due-process. Pet. at 3c-4c.

Unlike the successful individual plaintiffs in the cases cited by Petitioner,[1] all of which were reviewed in a similar challenge by the California Supreme Court in 1978 and held to be inapplicable to this issue,[2] the Nevada law only adversely affects cities and counties,

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[1] Petitioner relies on *Vlandis v. Kline*, 412 U.S. 441 (1973)(individual plaintiff instituted due process challenge to conclusive presumption about nonresidency for purposes of becoming eligible for in-state tuition); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1973)(individual plaintiffs mounted due process challenge to conclusive presumption that female teachers who were five months pregnant could not continue in job and must terminate employment); *Stanley v. Illinois*, 405 U.S. 645 (1972)(individual plaintiff challenged conclusive presumption that unmarried fathers are not suitable parents); *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508 (1973)(class of individuals raised due process challenge to conclusive presumption about relationship of tax dependency and eligibility for food stamps); *Turner v. Dep't of Employment Sec.*, 423 U.S. 44 (1975) (individual plaintiff instituted due process challenge to statute making pregnant woman ineligible for unemployment benefits for period extending from 12 weeks before expected date of childbirth and until a date six weeks after childbirth).

[2] Precisely the same U.S. Supreme Court caselaw was cited to the California Supreme Court in support of an identical argument against a similar workers compensation law containing a conclusive presumption for the benefit of police officers. The California Court found the cases easily distinguishable. *City and County of San Francisco v. Workers' Compensation Appeals Bd.*, 583 P.2d 151, 160 (Cal. 1978).

rather than individuals. It imposes upon them the burden of providing workers compensation benefits to eligible firefighters and police officers who contract heart disease. This Court has found no constitutional flaw in similar legislation, finding only a rational connection is necessary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (legislation may "readjust rights and burdens" and "impose a new duty or liability based on past acts" consistent with the Constitution). It is well established that counties and their departments, such as Respondent Perry's former employer, the Elko County Sheriff's Department, as political subdivisions of the State, do not have due-process rights under the Fourteenth Amendment that may be asserted against the state that created them. *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933)("A municipal corporation, created by the state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."). *See also Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 674 (1923)(citations omitted) ("political subdivisions of the state . . . are subject to the will of the [State] Legislature and may be compelled not only to recognize their legal obligations but to discharge obligations of an equitable and moral nature as well.").

For purposes of constitutional analysis, it does not matter that the due-process claim is being made by PACT, rather than the Elko County Sheriff's Department. PACT, as the department's insurer on this claim, stands in the department's shoes and cannot assert rights that its insured does not possess. *Great American Ins. Co. v. United States*, 575 F.2d 1031, 1033 (2d Cir. 1978). It is significant that PACT is not asserting a lack of notice to its potential responsibility for paying the sheriff's department's liability. The conclusive

presumption was added to NRS 617.457 in 1989. *Gallagher v. City of Las Vegas*, 959 P.2d 519, 522 n.2 (Nev. 1998).[3] PACT was not the department's workers compensation carrier in 1992, when Perry made his first claim but undertook that role prior to the present claim, made in 1998. Because PACT is in the business of providing workers compensation coverage to public agencies and political subdivisions, *see* Pet. at 2 n.2, the conclusive presumption was no surprise and must have been within its calculus in setting its premiums. Simply put, neither PACT nor its insured can mount any due-process claim.

PACT also claims the Nevada decision conflicts with a 35-year-old Connecticut Supreme Court decision, *Ducharme v. City of Putnam*, 285 A.2d 318 (Conn. 1971)), *superceded by statute*, where the Connecticut court struck down a similar statute after erroneously predicting that this Court was on the verge of liberalizing its standing doctrine to allow a political subdivision to assert a due-

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[3] While PACT asserts that the presumption is irrational because there is no consensus in the medical/scientific community that the stress entailed in service as a police officer or firefighter causes heart disease, Pet. at 5 n.3, the legislature is entitled to adopt one side of a debatable proposition as the State's public policy. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976). Siding with one set of experts over another is not arbitrary and capricious. *Id.* at 34. The California Supreme Court recognized that the division of medical opinion was "probably the most prolific and troublesome problem in workmen's compensation law' (Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution* (1967) 65 Mich. L. Rev. 441, 441), [and] arises from 'the persisting cleavage in medical theory itself' (id., at p. 475) as to the relationship between stress, physical exertion and progressive heart disease." *City and County of San Francisco*, 583 P.2d at 154-55.

process violation against the state.[4] Contrary to that prognostication, in the more than three decades since *Ducharme* was decided, no decision of this Court has even suggested that political subdivisions had acquired due-process rights that might be asserted against its own State. Instead, this Court has strengthened its deference to state sovereign authority. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Moreover, even while striking down the conclusive presumption statute, *Ducharme* suggested that the State could accomplish its objective, without offending constitutional principles, by imposing a straightforward obligation on political subdivisions to pay benefits to the same firefighters and police officers without calling it "workers compensation." *See Gregory* , 501 U.S. 452 at 322. The Connecticut legislature then took up the court's suggestion and enacted Conn. Gen. Stat. § 7-433c, obligating political subdivisions to provide special compensation in the manner of workers compensation benefits without calling it that to firefighters and police officers who suffer heart disease after meeting certain eligibility requirements. This statute was subsequently upheld against constitutional attack in *Grover v. Town of Manchester*, 357 A.2d 922, *appeal dismissed*, 423 U.S. 805 (1975).

Ducharme, thus, must be regarded as a confused decision and imperfect conflict, permitting a state to accomplish directly – by direct requirement of compensation – what it did not permit to occur through indirection, application of a conclusive presumption to the

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[4] The Connecticut Supreme Court found the due process violation under both the state and federal constitutions without engaging in any analysis that would suggest that the decision was based on adequate and independent grounds.

existing workers compensation system. The result is the same and constitutes little more than a distinction without a difference. Just as the "controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly," *Pullman Co. v. State of Kansas ex rel. Coleman*, 216 U.S. 56, 70 (1910), the Connecticut court's attempt to draw a distinction between the invalidated indirect attempt to help police and firefighters in favor of its endorsed direct attempt renders its precedential value a nullity and deprives Petitioner of its asserted conflict.

PACT urges upon this Court Connecticut's schizophrenic approach. It states that if "Nevada has an interest in making an outright gift or special benefit to police officers and firemen, it must do so *outside* the Nevada Industrial Insurance Act and Nevada Occupational Disease Act." Pet. at 10 (emphasis added). Yet no principle of constitutional law requires a sovereign state to eschew use of those two state statutes as a vehicle for this end in favor of another. In fact, how a State chooses to govern itself is largely outside the cognizance of federal instruction. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) (holding that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). *See also Sweazey v. New Hampshire*, 354 U.S. 234, 256 (1957) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states.") (Frankfurter, J., concurring).

Any conflict between Connecticut's *Ducharme* decision and that of the Nevada Supreme Court in the instant case turns on form rather than substance and cannot be regarded as certworthy. Moreover, more recent state supreme court decisions conclude that there is no

constitutional flaw. In addition to the Nevada decision below, the California Supreme Court upheld its similar conclusive presumption in *City and County of San Francisco, supra.*[5] In 1959, California amended its relevant statute to provide that a five-year or greater police force veteran's heart disease is occupationally related, and the presumption is not subject to rebuttal on the basis of evidence of a preexisting condition.[6] *Id.*, 583 P.2d at 153. In response to an identical constitutional challenge, the California Supreme Court found *Usery, supra*, "directly on point and clearly demonstrates the lack of merit in the city's due-process contention." *City and County of San Francisco,* 583 P.2d at 160. In *Usery,* this Court upheld a irrebuttable presumption in the Black Lung Act, 30 U.S.C. § 921 (c)(1), (2), that the death of a miner, who had worked in coal mines for 10 years and who died of respiratory disease, arose out of and in the course of employment.

II. NO FEDERAL ISSUE REQUIRING THIS COURT'S ATTENTION IS PRESENTED

PACT further asserts that the importance of the question presented can be gleaned from a newspaper

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[5] Other types of irrebuttable presumptions have also been upheld, such as conclusive presumptions of dependency. *See Flint River Mills v. Henry,* 236 S.E.2d 583 (Ga. 1977) (stepchildren); *McDonald v. Chrysler Corp.,* 242 N.W.2d 810 (Mich. 1976) (spouse, if living with worker); *Fidelity & Cas. Co. of N.Y. v. Masters,* 335 So.2d 722 (La. Ct. App. 2d Cir. 1976), *writ denied,* 338 So.2d 297 (La. 1976).

[6] Petitioner cites *Ducharme* for the mistaken proposition that no other state had adopted a conclusive presumption on the heart disease question as it affected police or firefighters. Pet. at 5. In so opining, the Connecticut court missed the 1959 California law.

article and recent actuarial studies alleging that the cost of compliance with the challenged statute and several others covering lung and hepatitis injuries on the job would amount to $2.8 billion over the next three decades for Nevada political subdivisions. Pet. at 4, 13. PACT concedes that this information was not part of the record during the administrative hearing and was submitted for the first time below in a petition for en banc consideration before the Nevada Supreme Court. *Id.* Nevada Rule of Appellate Procedure 40A(c) prohibits parties from raising issues in such a petition for the first time. While the assertions should receive no credit at all because it was not properly presented for consideration nor actually considered below, the potential costs in-state is properly a matter for state legislative consideration and does not transform this intramural dispute into one of sufficient national importance to draw this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

August 2006

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2874

Barbara Gruenewald
ANDERSON & GRUENEWALD
439 Marsh Avenue
Reno, Nevada 89509
(775) 322-3366

**Counsel of Record*

(4)

No. 06-36

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In The

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),

Petitioner,

v.

COLIN PERRY ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF IN OPPOSITION

LAURIE A. YOTT
BECKETT, YOTT & MCCARTY
6130 Plumas Street, Ste. 200
Reno, NV 89519
(775) 322-3366

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

NRS 617.457 benefits Nevada police officers and fire fighters who have been so employed for at least five years prior to becoming disabled by heart disease with a conclusive presumption that their heart problems arose out of such employment. In addition to the prerequisite five years of continuous full-time employment, the officer or firefighter must have submitted to annual physicals and must have corrected any predisposing conditions such as obesity, smoking, diabetes, high cholesterol or blood pressure when ordered by the examining physician.

The question presented is whether this presumption violates the Due Process Clause of the Fourteenth Amendment.

CORPORATE DISCLOSURE STATEMENT

Respondent Employers Insurance Company of Nevada (EICN) is a private insurance corporation wholly owned by Employers Insurance Group, Inc. Employers Insurance Group, Inc. is a corporation wholly owned by EIG Mutual Holding Company, a mutual company owned by EICN's policyholders. None of these entities are publicly traded and no publicly held company owns 10% or more of their stock.

At the time of certain relevant events, EICN was an agency of the State of Nevada known as the State Industrial Insurance System (SIIS) which administered the state's workers' compensation fund. On January 1, 2000, by legislative authorization and proclamation of the Governor of Nevada, the state agency became a private mutual insurance company. Both entities will be referred to as EICN in this brief, unless otherwise specifically stated.

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I. RESPONDENT'S BRIEF IN OPPOSITION

Respondent Employers' Insurance Company of Nevada (EICN) respectfully asks this Court to deny the Petition for Writ of Certiorari filed by Petitioner Public Agency Compensation Trust (PACT). There is no compelling reason to review the state court findings.

II. STATEMENT OF THE CASE

Respondent Colin Perry was employed in law enforcement by various rural Nevada cities and counties for twenty-four years. App. IX 1704. Between July 1, 1986 and February 17, 2000 he worked as a Deputy Sheriff for the Elko County Sheriff's Department. In 1992 he suffered an episode of unstable angina or lesion in his right coronary artery producing chest pain. App. IX 1641. He underwent angioplasty and continued to work. At that time Elko County was insured by EICN's predecessor SIIS. SIIS accepted the 1992 heart claim. In 1998 Mr. Perry suffered another episode of unstable angina, but this episode involved his left coronary artery. App. IX 1641. The workers compensation coverage for Elko County had at that time been taken over by PACT. Mr. Perry made a claim for the 1998 heart incident with PACT and requested reopening of his 1992 heart claim with SIIS. PACT's rejection of the claim was overturned by a workers compensation appeals officer, under Nevada's Last Injurious Exposure Rule. Pet. 1a – 14a. SIIS's denial of reopening was affirmed. These rulings were affirmed on review by a state district court (Pet. 1b – 12b) and the Nevada Supreme Court (Pet. 1c-6c).

The dispute is whether NRS 617.457 violates due process rights of PACT under the Fourteenth Amendment.

PACT is a non-profit unincorporated association exclusively made up of self insured political subdivisions (Pet. ii), permitted by Nevada Statute to provide workers' compensation to its public employer members. PACT is not entitled to assert a federal due process claim because the Fourteenth Amendment was written to protect individual rights, as opposed to collective or structural rights, and does not apply to a claim by political subdivisions against the state that created them.

Even if PACT is found to have standing to bring a due process challenge, the statute stands up to constitutional scrutiny. The constitutionality of occupational health presumptions have been upheld by this Court where they bear a rational relationship to a legitimate governmental purpose. The Nevada Supreme Court acknowledged the legislative history showed police officers and firefighters are at an increased risk of developing heart disease because of chronic stress on the job, and could have enacted the statute to encourage officers to remain in public service or to eliminate costly "battles-of-the-experts" in proving causation. Pet. 4c.

A presumption of constitutionality applies, and PACT has not met its burden of proving NRS 617.457 is unconstitutional. The fact the Nevada Legislature decided to resolve doubts in favor of police officers and firefighters regarding the causal connection between heart disease and employment does not mean it was irrational to do so. Conflicting medical evidence regarding a causal connection between the stress incidental to police work and heart disease was presented to the Nevada Legislature, and to the administrative court below in connection with the Perry claim. See, e.g., App. IX 1661-1703 and App. IX

1629-1660, 1724-1785; App. VIII 1360-1573, 1574-1594, 1595-1601; App. X 1786-2019; App. XI 2027-2087.

The Nevada Legislature did not leave the political subdivision employers without recourse in these heart claims. Strict prerequisite conditions must be met before the presumption becomes conclusive which provide the public employers a defense to the heart claims by officers. The officer must establish at least five years of uninterrupted full time service in the law enforcement capacity. He or she must also have undergone annual physicals arranged by the employer, and have corrected any conditions identified by the examining physician that would predispose him or her to heart disease. They could be required to undertake corrective health measures such as quitting smoking, losing weight, controlling diabetes or high blood pressure and/or reducing cholesterol.

Finally, PACT attempts to show fiscal impact by an article in a Las Vegas newspaper that was not properly admitted into the record. That article was published before a 2005 Nevada Supreme Court case that significantly reduced the potential workers compensation liability in many of these police and fire heart disease cases. Any officer who otherwise qualifies but becomes disabled from the heart disease after retirement will only receive medical treatment and not wage replacement compensation benefits.

It is respectfully submitted this Court should deny PACT's Petition for Writ of Certiorari.

III. REASONS FOR DENYING THE WRIT

A. PACT DOES NOT HAVE STANDING TO BRING A FEDERAL DUE PROCESS CHALLENGE

PACT exists by virtue of Nevada statutes which enable public entities to set up unincorporated nonprofit associations for the purpose of providing self insured workers' compensation to their employees. See, e.g., NRS 616A.055, 616B.350. PACT's membership is exclusively made up of Nevada cities, counties and towns. Pet. ii, n.1. At the time of his 1998 heart incident, Mr. Perry was a Deputy Sheriff with Elko County. Pet. 1. The County and its Sheriff's Department cannot claim a violation of due-process rights under the Fourteenth Amendment by virtue of the application of a Nevada statute. *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933), *Trenton v. New Jersey*, 262 U.S. 182 (1923) "[M]unicipalities and counties may not sue a state for alleged violations of the Fourteenth Amendment, because ... that Amendment 'was written to protect individual rights, as opposed to collective or structural rights.'" *Board of Cnty. Com'r of Sweetwater v. Geringer*, 297 F.3d 1108, 1116 n.1 (10th Cir. 2002) [quoting from *Branson School District R-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998). Citing *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933)].

PACT should be considered a public entity for purposes of this challenge because it was created to benefit public employers by allowing them to share the costs of self-funding workers compensation plans. See, generally, *Matter of Passino v. Jefferson-Lewis*, 277 A.D.2d 1028, 716 N.Y.S.2d 229 (2000). PACT exists only to benefit public

employers in their effort to provide workers' compensation to their employees, and therefore it is more akin to a public entity than a private insurance company. There is no reason to allow a political subdivision to get around the state's immunity from Fourteenth Amendment violation claims, simply by banding together with other public entities into a self-insured, unincorporated association. There is no reason to give the group of public entities making up the PACT self insured association better rights than those available to a self insured public entity standing alone.

PACT lacks standing to bring this due process challenge.

B. NO COMPELLING REASON TO REVIEW

PACT has not presented any compelling reason for discretionary review of the state court findings, as required by Supreme Court Rule 10.

Statutes are presumed to be constitutional. *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764 (1983). As such "the party challenging the statutory . . . scheme . . . bears the burden of demonstrating its unconstitutionality." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001).

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Federal courts defer to state court interpretations of state statutes. See, e.g., *Arizonans for Official English v. Arizona*, 530 U.S. 43, 48, 117 S.Ct. 1055, 1059, 137 L.Ed.2d 178, 181 (1977). Factual

findings receive similar deference *Hernandez v. New York*, 500 U.S. 352, 364-369, 111 S.Ct. 1859, 1968-1870, 114 L.Ed.2d 395, 409-412 (1991). All arguments in support of the Petition would require this Court to review and overturn the state court's factual findings and interpretations of state workers' compensation law. When considering the validity of legislation which is under constitutional attack, the state enjoys a wide range of discretion to make reasonable classifications for enacting laws over matters within its jurisdiction. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

As indicated by the Nevada Supreme Court below, the legislative history of NRS 617.457:

> . . . suggests that police officers and firefighters are at an increased risk of developing heart disease because of chronic stress on the job. As a result, the Legislature could have enacted NRS 617.457 for the purpose of encouraging firefighters and police officers to remain in public service or to eliminate costly "battles of the experts" used to prove or disprove a causal connection between firefighting and police work and heart disease.

Pet. 4c. The Nevada Court therefore concluded a rational basis exists for NRS 617.457 and that the statute is reasonably related to achieving a legitimate government purpose. Pet. 3c and 4c. PACT cannot accordingly overcome the statute's presumption of constitutional validity.

A very similar statute was found constitutionally justified by the California Supreme Court. *City and County of San Francisco v. Workers' Compensation Appeals Bd.*, 22 Cal.3d 103, 583 P.2d 151, 148 Cal.Rptr. 626 (1978). Noting the pronounced dichotomy in medical opinion regarding heart disease in the police work context, the

California Court believed "substantial justice" and equal treatment were widely thwarted in practice because the compensability of similar heart attacks varied fortuitously on the basis of which competing school of medical thought administrative officials . . . chose to credit in a particular case." *Id.*, at 115.[1] That Court justified compensability of cases involving pre-existing heart di ease by noting aggravations by work exposure are covered. *Id.*, at 115-116. Nevada workers' compensation law also covers occupational aggravations of pre-existing disease. NRS 617.366.

Not every conclusive presumption is constitutionally infirm. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976) this Court found a rational connection supporting employment duration based conclusive presumptions relating to black lung disease, as a result of conflicting medical evidence on the issue considered by the legislature. Nevada's legislature also considered the well-documented debate relating to whether stress resulting of law enforcement or fire fighting work causes heart disease. See, e.g., IX App. 1660-1703. The fact such medical

[1] As acknowledged in *Robertson v. North Dakota Wkr. Comp. Bur.*, 616 N.W.2d 844, 854 (ND 2000): "Other courts have recognized a split in the medical community about the causal relationship between law enforcement employment and heart disease, and have said the enactment of similar law enforcement presumptions represents a legislatively adopted premise that work stress of a law enforcement officer causes heart disease. See, *City and County of San Francisco v. Workers' Comp. Appeals Bd.*, 583 P.2d 151, 155-56 Cal. (1978); *Stephens v. Workmen's Comp. Appeals Bd.*, 97 Cal.Rptr. 713, 715 (Cal.Ct.App. 1971); *Swanson v. City of St. Paul*, 526 N.W.2d 366, 368 (Minn. 1995); *Linnell*, 305 N.W.2d at 601; *Schave v. Department of State Police*, 227 N.W.2d 278, 282 (Mich. 1975); *Fairfax County Fire and Rescue Servs. v. Newman*, 281 S.E.2d 897, 900 (Va. 1981)."

debate regarding the heart disease continues to exist today was shown by the conflicting medical opinions and scientific articles presented to the administrative appeals officer in Mr. Perry's hearing, below. See, e.g., App. IX 1629-1660, 1724-1785; App. VIII 1360-1573, 1574-1594, 1595-1601; App. X 1786-2019; App. XI 2027-2087.

PACT cites a 1971 Connecticut decision, *Ducharme v. City of Putnam*, 285 A.2d 318 (Conn. 1971) for the proposition the heart disease presumption is a "gift or special benefit" to police and firefighters, and as such must be done by legislation outside of the Nevada Industrial Insurance Act. Pet. 10. Although Connecticut took that route and indistinguishable benefits were ultimately enacted and constitutionally upheld,[2] there is no reason to force this distinction as to form rather than substance on Nevada.

The public employers of police officers and firefighters retain defenses to the heart disease claims, based upon the prerequisites to the applicability of the presumption. The presumption of occupational heart problems does not apply unless the officer has at least five continuous, full time years of service before the manifestation of the disability. NRS 617.457(1). During the officer's entire tenure of employment he or she must also have submitted to annual physicals of the heart arranged by the employer. NRS 617.457(3). The statute also requires the officer to correct predisposing conditions which led to the heart disease, where ordered by the examining physician. NRS 617.457(6). The occupational connection between the

[2] *See, Bakelaar v. West Haven*, 475 A.2d 283 (1984), citing *Grover v. Manchester*, 357 A.2d 922, appeal dismissed, 423 U.S. 805 (1975).

service and the heart problems is therefore narrowed considerably by these prerequisites.

C. PACT'S FISCAL IMPORT ARGUMENT IS FLAWED

PACT attempts to demonstrate a compelling fiscal impact as a result of figures given in a July 31, 2005 Las Vegas newspaper article discussing the statute.[3] Subsequent to that article, however, on October 6, 2005, the Nevada Supreme Court came down with *Howard v. City of Las Vegas*, 121 Nev. Adv. Op. No. 70, 120 P.3d 410 (2005) which will significantly reduce the extent of public employer fiscal liability in these claims. *Howard* holds that officers who do not become disabled by their heart disease until after retirement are not entitled to wage replacement or other money compensation benefits. Such recipients are only entitled to medical treatment through their workers' compensation claims. The fiscal impact of the legislation is therefore not accurately shown by the July 2005 newspaper article.

PACT's complaint regarding the fiscal impact also belies the fact it had notice of the heart legislation at the time the association of public entities was formed. The law enforcement heart presumption has been in effect since 1989, while the enabling legislation for self insured groups of public employers was not enacted until 1993. PACT

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[3] Consideration of the facts in this article may be procedurally inappropriate, since it was not in the record on appeal. The article was inappropriately contained in PACT's motion for en banc consideration before the Nevada Supreme Court. NRAP 40A(c).

should have been assessing its group members accordingly and is presumably prepared for future fiscal impact.

IV. CONCLUSION

It is respectfully submitted the Petition should be denied.

Respectfully submitted,

LAURIE ALEXANDRA YOTT
BECKETT, YOTT & MCCARTY
6130 Plumas Street, Ste. 200
Reno, NV 89519
(775) 824-8833
Attorneys for Respondent

(3)

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In The

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),

Petitioner,

v.

COLIN PERRY ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

REPLY IN BRIEF

STEPHEN C. BALKENBUSH, ESQ.*
ROBERT F. BALKENBUSH, ESQ.
THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER
6590 S. McCarran Blvd., Ste. B
Reno, NV 89509
(775) 786-2882

**Counsel of Record*
September 18, 2006

Attorneys for the Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MOVANT'S BRIEF IN REPLY

PACT respectfully submits the instant Brief in Reply to the Briefs in Opposition submitted by Colin Perry and EICN.

A. PACT HAS STANDING TO ASSERT A FOURTEENTH AMENDMENT DUE PROCESS VIOLATION.

Points not raised in the lower court will not be entertained for the first time on appeal. *Gibbons v. Martin*, 91 Nev. 269, 270, 534 P.2d 915, 915 (1975) (citation omitted). Respondents never challenged PACT's standing in the lower proceedings; therefore, the issue is improperly raised for the first time in their Opposition Briefs. Nevertheless, PACT has standing to bring this Petition.[1]

PACT is an association of self-insured public employers as defined by NRS 616A.055.[2] Further, NRS 277.055(2)(a) allows two or more public agencies to enter into cooperative agreements to purchase casualty insurance as defined by NRS 681A.020.[3] PACT was created under the Interlocal Cooperation Act of Nevada,[4] and pursuant to the Public Agency Compensation Trust Interlocal Cooperation Agreement

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[1] *See Assoc. of Data Processing v. Camp.*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970) (standing concerns whether the interest sought to be protected is within the "zone of interests" to be protected by the constitutional guarantee in question and may include economic values (citation omitted).

[2] An association of self-insured public employers is a nonprofit, unincorporated association with five or more public employers issued a certificate to operate by the Commissioner of Insurance. *See also* NRS 616A.270 defining an "Insurer" as self-insured employers; associations of self-insured public and private employers; and private carriers.

[3] Casualty insurance includes workmen's compensation and employer's liability. NRS 681A.020(c).

[4] NRS 277.080 *et seq.*

("Agreement"). App. F 1f-3f.[5] The Agreement gives PACT the power to sue and be sued in its own name. App. F 4f-5f.

Public and private self-insured employer associations are subject to NRS 616B.350 through NRS 616B.446, which establish qualifications and procedures regarding associations' operations and fiscal responsibilities. Associations must elect a board of trustees consisting of at least five members. NRS 616B.365(1). The power of the board includes taking necessary action to protect the assets of the association. NRS 616B.365(2)(b). Arguably, this includes filing suit; a power expressly granted to PACT in the Interlocal Cooperation Agreement under which PACT was created.

Great American Ins. Co. v. U.S., 575 F.2d 1031 (2d Cir. 1978), cited by Perry is inapplicable. That was a subrogation action instituted by a private insurer after the U.S. Government refused to reimburse it for damage to the insured's premises. Perry Opp. at 5.[6] PACT is not asserting a subrogation right here, therefore PACT is not "standing in the shoes" of its members seeking reimbursement on their behalf. Rather, PACT seeks to safeguard the assets of the association by challenging an over-inclusive statute that forces it to pay claims not causally related to an employee's employment. Perry acknowledges that *PACT*, *not* the Sheriff's Department brings the instant Petition positing the distinction is insignificant. *Id.* The distinction is significant because the Nevada Legislature has specifically afforded both public and private self-insured employer associations the right to take appropriate measures

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[5] Due to Respondents' new argument that PACT lacks standing, it was necessary for PACT, in its Reply Brief, to supplement the Appendix with additional material to aid the Court's understanding of PACT's formation and the rights afforded to it by law. *See* Supreme Court Rule 14(i)(vi).

[6] In addition, the action was dismissed as being time barred, not because the court found the insurer did not possess standing to sue the U.S. Government. *See Great American*, 575 F.2d at 1033.

to protect the assets of the association, including filing suit in its own name.[7]

EICN's argument that political subdivisions are "banding together" to flout the state's Fourteenth Amendment immunity is also flawed. EICN Opp. at 5. If association members are "banding together" it is because the law *requires* at least five employers engaged in the same or similar classification of employment to be considered for inclusion in a self-insured association. NRS 616B.350(1)(a). PACT also rejects the notion that a public self-insured association has "better" rights than a public entity standing alone.[8] EICN Opp. at 5. PACT contends that all insurers would have the right to bring this Petition pursuant to their codified appellate rights.[9] Thus, EICN's argument that PACT should be treated as a public entity rather than a private insurance company *id.*, is irrelevant and should be

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[7] *See generally* NRS 81.170 *et seq.*, which governs cooperative associations and provides entities organized under that section may sue and be sued in any court in its associate name, and may do all other things proper to be done for the purpose of carrying into effect the objects for which the cooperative association is formed. NRS 81.220(1), NRS 81.220(10).

[8] *See* NRS 616B.300 to NRS 616B.366, inclusive, which apply to self-insured employers.

[9] *See* NRS 233B.130 (party aggrieved by the decision in an administrative proceeding may petition for judicial review); NRS 233B.150 (aggrieved party may appeal final judgment of the district court to the supreme court); NRS 313C.315 (an aggrieved person may request a hearing before a hearing officer); NRS 616C.345 (party aggrieved by a hearing officer's decision may appeal to the appeals officer); NRS 616C.370 (judicial proceedings are limited to judicial review of the decision of an appeals officer), *but see* Pet. at 13a, ¶¶ 16-18 (appeals officer decision concluding that it is not a court for review of constitutional challenges, citing *Nev. Indus. Comm'n v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977)); *and see U.S. v. ICC*, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451 (1949) (United States appealed a decision of the Interstate Commerce Commission to district court, and was required to be added as an opposing party by statute; thus where the United States was bringing suit against itself, this court said a court must look behind names that symbolize the parties to determine whether a justiciable case or controversy is present).

rejected.[10] *See* also footnote 9. PACT has standing to assert a Due Process claim under the Fourteenth Amendment.

B. THE RATIONAL RELATIONSHIP TEST APPLIES TO PRESUMPTIONS THAT ARE REBUTTABLE.

A rebuttable presumption operates to shift the burden of proof, while a conclusive presumption "is in actuality a substantive rule of law." *City and County of San Francisco v. Workers' Compensation Appeals Bd.*, 583 P.2d 151, 162 (Cal. 1978); *Howard v. City of Las Vegas*, 121 Nev. Adv. Op. 70, 120 P.3d 410, 411 (Nev. 2005) (firefighters with heart diseases are entitled to occupational disease benefits *as a matter of law*) (emphasis added). *See also, e.g.*, 4 Wigmore Evidence § 1353 (Chadbourn rev. 1972) (a rule of conclusive evidence is not a rule of evidence at all, but rather a rule of substantive law).

In *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78 (1910), this Court held in a due process challenge, there must be a rational relationship between the presumed fact and the fact proven. *See also Usery v. Elkhorn Mining Co.*, 428 U.S. 1, 28, 96 S. Ct. 2882,

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[10] Although the court in *Matter of Passino v. Jefferson-Lewis*, 277 A.D.2d 1028 (2000), found the municipal cooperative health benefit plan to be a public agency rather than analogous to a private insurer, also holding it was a commercial enterprise by legislative design. *Id.* at 1029. As a public agency, the municipal cooperative was afforded protection under the "commercial enterprise" exception from having to disclose public agency records under a Freedom of Information Law request. *Id.*; *and see* NY CLS Pub. O. § 87(2)(d). Moreover, despite the court's underlying rationale for finding the municipal cooperative to be agency, it is noteworthy that the New York legislature in NY CLS Ins. § 4701 made legislative findings evincing that legislature's intent, like Nevada, to conserve the assets of the health plan, including: the employment of appropriate safeguards to help keep self-funded municipal cooperative health benefits plans from exposing municipalities and their taxpayers to unpredictable and potentially catastrophic liabilities; and implementing a system to assure the plans were operated on an actuarially sound basis with appropriate financial standards to protect plan participants, their beneficiaries and taxpayers. NY CLS Ins. § 4701(b), (d)(1).

49 L. Ed. 2d 752 (1976) (presumptions in civil statutes are consistently tested against the standard in *Turnipseed*). *Turnipseed* further stated the test applies to presumptions that are *rebuttable*, and no violation of due process will be found where the opposing party has the *opportunity to present a defense* to the main fact presumed.[11] In later cases where this Court held irrebuttable presumptions unconstitutional, the Court stated that the application of an irrebuttable presumption that is not necessarily or universally true in all cases is violative of the Due Process Clause. *Cleveland v. Bd. of Ed. v. LaFleur*, 414 U.S. 632, 644, 94 S. Ct. 791, 799, 39 L. Ed. 2d 52, 64 (1974). *See also Vlandis v. Kline*, 412 U.S. 441, 462, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973) (Rehnquist, J., dissenting) ("the Court now engrafts the 'close judicial scrutiny' test onto the Due Process Clause whenever we deal with something like 'permanent irrebuttable presumptions' (demonstrating his belief that, although not announced, scrutiny greater than rational basis was applied to test the irreubuttable presumption)).

Perry argues the holding of *City and County of San Francisco, supra*, rendered this Court's decisions invalidating unconstitutional conclusive presumptions inapplicable to the instant Petition. Perry Opp. at 4. However, the presumption in that case was not a "conclusive" presumption "similar" to that of Nevada, as Perry suggests. *Id.* at 9.[12] Rather, Cal. Lab. Code § 3212.5 plainly states the California presumption

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[11] The presumption "must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." *Turnipseed*, 219 U.S. at 43.

[12] Moreover, although both Respondents positively cite *City and County of San Francisco*, neither Perry nor EICN distinguishes how the public employer, City and County of San Francisco, had standing to directly challenge the statute at issue in that case.

is disputable.[13] Thus, *City and County of San Francisco* is inapplicable to the Petition at bar.

Respondents also cite *Usery, supra*, arguing this Court upheld an irrebuttable presumption applying the rational basis test. *See* Perry Opp. at 5; *and see* EICN Opp. at 7. Distinguishing the four presumptions discussed in *Usery* demonstrates the error in Respondents' argument. Section 411(c)(3) of the Black Lung Act contains the only irrebuttable presumption in the Act – giving an employee the presumption of total disability and qualifying him for benefits. *Usery*, 428 U.S. at 21. The Court did not apply the rational basis test to the irrebuttable presumption, but concluded Congress was essentially guilty of bad drafting, as it could have provided the same benefit to miners without using an irrebuttable presumption. *Id.* at 23-24.

The three other presumptions in the Act were held to be "*explicitly rebuttable* by an operator seeking to *avoid liability*." *Id.* at 11 (emphasis added). The effect of these presumptions was to shift the evidentiary burden going forward from the claimant to the operator. *Id.* at 27. *See also Pauley v. Bethengery Mines, Inc.*, 501 U.S. 680, 702-03, 111 S. Ct. 2524, 2537, 115 L. Ed. 2d 604 (1991) (rejecting argument that the regulations created a conclusive presumption as the statutes expressly provided the presumptions would be rebuttable).

Usery's rebuttable presumptions shifted the burden of production going forward to the employer, and did not bar the employer from submitting rebuttal evidence against liability altogether. The conclusive presumption in NRS 617.457(1), however, bars PACT from submitting any rebuttal evidence against the presumed causation between employment and heart disease. Hence, *Usery* is distinguishable regarding the

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[13] *See* Cal. Lab. Code § 3212.5 ("Such heart trouble or pneumonia so developing or manifesting itself shall be presumed to arise out of and in the course of the employment . . . *This presumption is disputable and may be controverted by other evidence* . . . Such heart trouble shall in no case be attributed to any disease existing prior to such development or manifestation.") (Emphasis added).

Court's application of the rational basis test to the presumption.

The result of NRS 617.457(1) remains analogous to the "individual" unconstitutional irrebuttable presumption cases cited in PACT's opening brief. *See*, Pet. at 6-8; *and see* Perry Opp. at 4.[14] Like *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), the conclusive presumption in NRS 617.457(1) deprives PACT of the opportunity to overcome the presumption, resulting in a deprivation of financial assets without due process of law. *See Vlandis*, 412 U.S. at 452.

Respondents cite NRS 617.457(6),[15] as a means to challenge eligibility of the conclusive presumption. PACT is not challenging Subsection 6; however, Perry's case demonstrates the utter futility of the provision. The Appeals Officer found Perry suffered from predisposing conditions, including: age, diabetes, hyperlipidemia, high cholesterol, high blood pressure and obesity. Pet. at 7a, ¶ 21. Although Perry did not "correct" the predisposing conditions, the conclusive presumption was applied because the Appeals Officer found Perry cooperated by taking medication and dietary advice prescribed by his doctors. Pet. at 9a ¶ 2. If the lower court's decisions are allowed to stand, an employee still benefits from the conclusive presumption without actually correcting his predisposing conditions. Notwithstanding the Appeals Officer's decision, NRS 617.457(6) only applies to conditions that are correctable by the employee.

City of Temple Terrace v. Bailey, 481 So.2d 49 (Fla. Dist. Ct. App. 1985) illustrates such a paradigm. There,

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[14] Despite Perry's attempt to distinguish cases brought by individuals as inapplicable to PACT, PACT believes it has successfully demonstrated in the foregoing Standing Argument that it has recognition and rights unto itself like an "individual" that are independent of its public employer members.

[15] NRS 617.457(6) provides: Failure to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to the annual examination excludes the employee from the benefits of this section if the correction is within the ability of the employee.

the court held the rebuttable presumption in Fla. Stat. § 112.18(1) was misapplied when the hearing officer found a fire chief's congenital aortic stenosis a compensable work related injury. *Id.* at 50. Although the chief underwent an employment physical, the disease was not detected until it progressed to causing severe physical symptoms requiring valve replacement. The court opined the medical evidence of a congenital defect established the *absence* of a causal connection between his disease and employment, effectively rebutting the presumption. *Id.* In dicta, the court stated "heart disease" in the statute was not limited only to heart attacks because the statute did not specifically exclude congenital or pre-existing heart disease from coverage. *Id.* at 51.

NRS 617.457(1) is similar to Fla. Stat. § 112.18(1), in that it broadly applies to "diseases of the heart". A case analogous to *Bailey* arising in Nevada would require PACT to compensate the employee, because, despite 5 years' employment and submission to annual physicals, the disease is not correctable by the employee.[16] [17]

1. Administrative convenience will not save a presumption that is constitutionally infirm.

The 1989 amendment to NRS 617.457(1) adding the conclusive presumption was intended to avoid a battle of the experts associated with proving causation in heart disease cases. *Gallagher v. City of Las Vegas*, 114 Nev. 595,

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[16] It is not axiomatic the worker's compensation statute is intended to only cover diseases arising from employment. The Nevada Supreme Court has repeatedly refused to imply provisions into the workers' compensation scheme that have not been expressly included by the legislature. *Silvera v. Employers Ins. Co.*, 118 Nev. 105, 109, 40 P.3d 429, 432 (2002).

[17] Respondents argue without authority that PACT's knowledge of the statute prior to entering into the agreement translates into a waiver of its right to due process. *See* Perry Opp. at 3; ECIN Opp. at 9. This Court has repeatedly stated it will not consider hypothetical questions. *See Princeton Univ. v. Schmid*, 455 U.S. 100 (1982). Thus, PACT was required to be subjected to the statute to acquire standing to challenge it.

600, 959 P.2d 519, 522 (1998). In *Cleveland v. Board of Ed. v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974), however, this Court stated that an irrebuttable presumption that assumes physical incompetency in the face of potentially contrary medical evidence is unconstitutional. 414 U.S. at 644. This was so, despite the "plethora of conflicting medical testimony" in *LaFleur* and other similar cases. *Id.* Instead of boosting an employee's case with a rebuttable presumption, the Nevada Legislature impermissibly transformed an evidentiary burden into a substantive rule of law. The State's desire for administrative ease has nullified the element of causation; precluding PACT from presenting a defense to the presumed fact that all heart disease arises from employment. *See Stanley v. Illinois*, 405 U.S. 645, 648, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (It is insufficient under the Due Process Clause to presume rather than to prove solely because it is more convenient).

Administrative ease and certainty alone cannot save a conclusive presumption from invalidity under the Due Process Clause; therefore, other reasonable and practicable means should be employed to establish the pertinent facts. *Vlandis*, 412 U.S. at 452. Nevada can provide the same benefit outside the workers' compensation scheme, as recognized in Connecticut.[18] Respondents claim this approach is a "distinction without a difference." However, the constitutionality of this method was upheld after its implementation,[19] and it continues to receive favorable treatment from that state's high court.[20]

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[18] *See Ducharme v. City of Putnam*, 285 A.2d 318 (Conn. 1971), striking down a similar conclusive presumption; *and see* the resulting statute Conn. Gen. Stat. § 7-433(c), enacted after *Ducharme*.

[19] *See Grover v. Town of Manchester*, 357 A.2d 922 (Conn. 1974).

[20] *See Bergeson v. City of New London*, 850 A.2d 184 (Conn. 2004) (the legislature's action in providing "special compensation, or even an outright bonus, to qualifying [police officers] and firefighters, serves a proper public purpose . . . The outright bonus provided by the statute is that the claimant is not required to prove that the heart disease is

(Continued on following page)

Alternatively, if the Nevada Legislature's intent was not to eliminate proving causation, NRS 617.457(1) should be changed to reflect the pre-1989 amendment, when the burden was only shifted, not eliminated.

EICN states the decision in *Howard v. City of Las Vegas*, 121 Nev. Adv. Op. 70, 120 P.3d 410 (Nev. 2005) will reduce an employer's fiscal responsibility in these claims because it eliminated the election of a retired employee to receive disability benefits pursuant to NRS 617.457(7). EICN Opp. at 9. Although true with regard to lost wages, an employee still receives medical benefits. *Id.* at 411. Thus, the fiscal impact, and hence the unfunded liability after *Howard* remains uncertain regarding worker's compensation benefits.

CONCLUSION

PACT respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

STEPHEN C. BALKENBUSH, ESQ.
ROBERT F. BALKENBUSH, ESQ.
THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER
6590 S. McCarran Blvd., Ste. B
Reno, NV 89509
(775) 786-2882
Attorneys for the Petitioner

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causally connected to (his) employment." 850 A.2d at 193-94 (brackets original) (citations omitted)).

APPENDICES

APPENDIX F

PUBLIC AGENCY COMPENSATION TRUST

INTERLOCAL COOPERATION AGREEMENT

THIS AGREEMENT, is made by and between the political subdivisions existing under the Constitution and laws of the State of Nevada and which are signatory to this agreement.

WHEREAS, Nevada Revised Statutes 277.080 to 277.180 permits political subdivisions to make the most efficient use of their powers by enabling them to cooperate with other political subdivisions on a basis of mutual advantage and thereby provide services which will be [sic] meet the needs of their citizens; and

WHEREAS, Nevada Revised Statutes 277.055 permits two or more political subdivisions of the State of Nevada to enter into a cooperative agreement for the purchase of insurance or the establishment of a self-insurance reserve or fund for coverage under a plan of workers' compensation as defined in NRS 616 and 617 and employer's liability; or insurance for any combination of these kinds of insurance; and

WHEREAS, the political subdivisions executing this agreement desire to join together for the purpose of providing workers' compensation coverage and jointly funding programs of pooled self-insurance, insurance and excess insurance for workers' compensation pursuant to NRS 616B.350 and related provisions;

NOW THEREFORE, in consideration of the mutual promises and agreements contained herein and subject to the provisions of Nevada Revised Statutes and all other

applicable rules and regulations, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

Section 1. *"Agreement"* shall mean this agreement entitled "Public Agency Compensation Trust" and as amended in the future.

Section 2. *"Board of Directors"* or *"Board"* shall mean the governing body of the PACT.

Section 3. *"Claim"* shall mean a claim made against a Member arising out of a Loss which is covered by insurance or pooling program of the PACT.

Section 4. *"Excess Insurance Program"* shall mean a program of the PACT under which Members or Participating Members are protected against designated Losses in excess of their Self-Insured Retention levels.

Section 5. *"Executive Committee"* shall mean the Executive Committee of the Board of Directors as described in Article 12 of this Agreement.

Section 6. *"Fiscal Year"* shall mean that period of twelve months as established by the Board of Directors as the fiscal year of the PACT.

Section 7. *"Loss"* shall mean a liability or potential liability of a Member including litigation expenses, attorneys' fees and costs covered by an insurance or pooling program of the PACT.

Section 8. *"Maintenance Deductible"* shall mean, as to any one Loss, that portion payable by the Member directly and not the PACT or its excess insurers.

Section 9. *"Member"* shall mean any Public Agency which is a member of the PACT, and shall include school districts, rural hospitals as defined in NRS 449.0177, whether a non-profit or public hospital, and such districts to which the Board has granted voting status. Other district or agencies whether or not the governing body of the City or County is *ex officio* the governing body as described in and subject to Article 3 of this Agreement may be a party to this Agreement but shall not be considered a Member for the purpose of voting or participation as a voting member of the Board or of any Executive or other committee in which voting Member status is required except when granted voting status pursuant to the following criteria. Voting status as a Member will exist for any Public Agency which meets three of the following four criteria:

1. Pays premiums and administrative costs of at least $10,000 annually
2. Contributes to the Loss Fund at least $10,000 annually
3. Maintains a payroll of least $500,000 annually
4. Has property values of at least $1,000,000 annually,

Such criteria may be changed from time to time by vote of the Board of Directors which change shall take effect subsequent to the meeting at which the Board approved the changes.

Section 10. *"PACT"* shall mean the Public Agency Compensation Trust created by this agreement.

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ARTICLE 4

NAME OF PACT

The name of the PACT established by the Members hereunder shall be "PUBLIC AGENCY COMPENSATION TRUST."

ARTICLE 5

POWERS OF THE PACT

The PACT shall have all of the powers common to any Public Agency and all additional powers set forth in the interlocal cooperation laws of the State of Nevada, and the PACT is authorized to do all acts necessary for the exercise of said powers, including but not limited to, the following:

A. To make and enter into contracts;

B. To incur debts, liabilities, and obligations;

C. To acquire, hold, or dispose of property, contributions and donations of property, funds, services, and other forms of assistance from persons, firms, corporations, and governmental entities;

D. To sue and be sued in its own name, but not by its Members;

E. To settle any claim against the PACT or its Members as hereinafter provided;

F. To receive and use contributions and advances from Members, including contributions or advances of personnel, equipment, or property;

G. To invest any money in its treasury that is not required for its immediate necessities, pursuant to Nevada Laws applicable to investments by a Public Agency; and

H. To carry out all provisions of this Agreement.

* * *